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The Integrity of Law: Legal Positivism and Natural Law

by

Michael P. Bradley ©

A thesis submitted to the Faculty of Graduate Studies and Research in
partial fulfillment of the requirements for the degree of
Doctor of Philosophy

Department of Political Science

Edmonton, Alberta
Fall, 1995

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Michael P Bradley

Michael P. Bradley
504 RH Michener Park
Edmonton, Alberta
T6H 4M5

July 28, 1995

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled **The Integrity of Law: Legal Positivism and Natural Law** submitted by **Michael Bradley** in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Tom Pocklington
Professor T. Pocklington

Professor D. Carmichael

Professor R. Shiner

Judith A. Garber
Professor J. Garber

Professor F. Judson

Professor G. Pyrcz

25 May 1995
Date

Dedication

My dissertation is devoted to my wife
Marlene
whom I love very much
and to my parents
Margeurite and Clarence

Abstract

This dissertation explores the meaning and practical implications of law within the framework of debate established by legal positivism and natural law theory. The main thesis is that the treatment of justification in law by legal positivism inappropriately ignores important practical and moral dimensions of law. I argue that the criteria of validity used to identify law fail as adequate reasons or justifications for the application of law. Justification in law involves attention to certain human needs and principles. In Chapter One, I identify some key practical and moral dimensions relating to law. In Chapter Two, I set out the logic, structure, methodological assumptions, and theoretical objectives of legal positivism. In particular, I examine the social fact and the separation of law and morality theses. In Chapter Three, I expose some of the moral concerns of legal positivists including John Austin, H.L.A. Hart, and Joseph Raz. I am concerned to understand the purpose of these undertakings and their relationship to the allegedly distinct concern to identify and apply law apart from moral argument or justification. Chapter Four puts forward the critical format for the rest of the dissertation and focuses on some internal inconsistencies and other weaknesses in legal positivism's treatment of law. Chapters Five through Nine compose a general theory of natural law theories. Chapter Five identifies the general framework of natural law theory in terms of ethical naturalism, non-consequentialism, and the rejection of the social fact and separation theses. In Chapter Six, I introduce distinctions between conceptual, procedural, and substantive theoretical levels, and examine the first level. In Chapter Seven, I focus on procedural theory. In Chapter Eight, I explore substantive theories. In these three chapters, I undertake critical expositions of the theories of M.J.

Detmold, Lon Fuller, John Finnis, and Jean-Jacques Rousseau. In Chapter Nine, I develop and defend the critical concept of the *integrity of law* which includes ideas about proper justification, the appropriate relationship between officials and citizen-subjects, the limitation of evil by law, and the importance of securing respect for law. Chapter Ten summarizes the argument and provides concluding thoughts.

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Chapter One

The thesis of this dissertation is that legal positivism's treatment of law is woefully inadequate because it fails to examine and account for many of the important moral and practical aspects of the practice and concept of law. This theory of law is also problematic due to a number of logical inconsistencies and weaknesses of argument. While these are important and related to the dismal treatment of the relationships between law and morality in particular, I am much more concerned with critically examining the question of justification in relation to law and legal practice. Justification is important because law is a practical institution involving politically and morally-relevant interests. The theory of justification developed by legal positivism ignores such interests. A theory of law is incomplete without serious attention to this matter. Attached to the exposition and critique of legal positivism's main theses is a systematic effort to identify an appropriate justificatory framework and its dimensions. I argue that natural law theory in general provides a useful and sound framework for this in the concept of the *integrity of law* . This idea is implicit in the critical enterprise of natural law theory and includes positions on justificatory requirements, appropriate relations between officials and subjects, the relationship between evil and law, and the importance of respect for law.

I think that the practical and moral aspects important in relation to law are captured by the concept of the *integrity of law* . In order to see the relevance of this concept and its main features, let us begin by examining some interesting, indeed provocative, and very practical literary examples. In Kafka's The Castle[1], the protagonist, a surveyor of strange lands, perhaps not without purpose but with extreme ambiguity called "K.", finds himself subject to a complex variety of vague, bewildering, and frustrating situations including his relationship with the local legal authorities. K.'s experiences illustrate the lengths to which law can retain a certain forcefulness while being taken in the inappropriate directions, so to speak, of arbitrariness, irrelevance, and purposelessness. A particularly important question surfaces here. What sort of attitudes or level of respect and responsibility should officials assume toward their official undertakings? Not the least of these undertakings concerns, I think, the question of justification as well as the consequences of official justificatory efforts on a subject's attitude toward the law. Some of K.'s experiences with regard to this question can be noted in the following excerpt:

> "I thought-erroneously, as it turns out-that I could take out of your former words that there was still some very tiny hope for me." "Certainly," replied the landlady, "that's my meaning exactly. You're twisting my words again, only this time in the opposite way. In my opinion there is such a hope for you, and founded actually on this protocol and nothing else. But it is not of such a nature as you can simply fall on Herr Momus with the question: 'Shall I be allowed to see Klamm if I answer your questions?' When a child asks questions like that; people laugh; when a grown man does it, it is an insult to all authority; Herr Momus graciously concealed this under the politeness of his reply. But the hope that I mean consists simply in this: that through the protocol you have a sort of connection perhaps with Klamm. Isn't that enough? If anyone inquired for any services that might earn you the privilege of such a hope, could you bring forward the slightest one? For the last time, that's the best that can be said about this hope of yours, and certainly Herr Momus in his official capacity could never give even the slightest hint of it. For him it's a matter, as he says, merely of keeping a record of this afternoon's happenings, for the sake of order; more than that he won't say, even if you ask him this minute his opinion of what I've said." "Will Klamm, then, Mr. Secretary," asked K., "read the protocol?" "No," replied Momus, "why should he? Klamm can't read every protocol, in fact he reads none. 'Keep away from me with your protocols!' he usually says."

In Henry Adams, Democracy[2], there is nothing of the relationship between ambiguity and cruelty in the Castle, but a story of graft and corruption at the highest levels of government. The antagonist, Mr. Ratcliffe, with "a certain coarse and animal expression about the mouth, and an indefinable coldness in the eye" bribes, flatters, and manipulates himself through one official position up to the next. Behind his success lie questions about the nature of politics and law. Most importantly, we are confronted with the possibilities for achieving genuine public ends through law and popular and public institutions, and with the nature of citizenry and its relation to law. So again we are concerned with the nature of official undertakings, and in particular with, the question of role-responsibility.

> "Mr. Ratcliffe! I have listened to you with a great deal more patience and respect than you deserve. For one long hour I have degraded myself by discussing with you the question whether I should marry a man who by his own confession has betrayed the highest trusts that could be placed on him, who has taken money for his votes, as a Senator, and who is now in public office by means of a successful fraud of his own, when in justice he should be in a State's prison. I will have no more of this. Understand, once and for all, that there is an impassable gulf between your life and mine. I do not doubt that you will make yourself President, but whatever and wherever you are, never speak to me or recognize me again!"..."Sybil, dearest, will you go abroad with me again?" "Of course I will," said Sybil; "I will go to the end of the world with you." "I want to go to Egypt," said Madeleine, still smiling faintly. "Democracy has shaken my nerves to pieces. Oh what a rest it would be to live in the Great Pyramid and look out forever at the polar star!"

Some of the darker effects of corruption and arbitrary or uncontrolled power on the achievement of public good are depicted in Frank Norris' novel The Octopus[3] which describes the sometimes deadly conflict between agricultural and railroad interests at the end of the 19th century in central

California. Norris catalogues the personal suffering wrought through the tension between the apparent "forces" of economics, on the one hand, and politics on the other. We should examine the role law might play in relationship to economic justice . This is important from the standpoint of justification and for the question about the relationship between law and evil. Such concerns are evident in the book as a whole, the drama of which is pitched emphatically in the brief excerpt below:

> The event had been so long in preparation, the event which it had been said would never come to pass, the last trial of strength, the last fight between the trust and the people, the direct brutal grapple of armed men, the law defied, the government ignored-behold, here it was close at hand.

But the human suffering attendant upon the mere failure to observe moral principles in law illustrated just above multiplies on itself when law or its shadow of formalism becomes the sole instrument of political control and abuse. Arthur Koestler's Darkness at Noon [4] makes it quite clear that when political and ideological rigidness combine with or become entailed by the logic of law the worst form of abuse results. But neither is this good reason for assuming the impenetrability of law by morality. Indeed, it puts the question of the justification of law and its relation to evil where it ought to be, that is, into the front and center of our view. Consider the excerpt below from the diary of Koestler's protagonist Rubashov:

> We replaced vision by logical deduction; but although we all started from the same point of departure, we came to divergent results. Proof disproved proof, and finally we had to recur to faith-to axiomatic faith in the rightness of one's own reasoning. That is the crucial point. We have thrown all ballast overboard; only one anchor hold us: faith in one's self. Geometry is the purest realization of human reason; but Euclid's axioms cannot be proved. He who does not believe in them sees the whole building crash. No. 1 has faith in himself, tough, slow, sullen and unshakeable. He has the most solid anchor-chain of all.

One thing the passages above illustrate is the problem of the possibilities for progressively more serious human suffering. Most importantly, the passages suggest what role law or what often passes for law can play in the cause of or in relation to suffering. In the first example, profound confusion and frustration result from the impersonality and blind formalism of the law. The formal dimensions of law can indeed achieve a rather empty, seemingly pointless, sense of order perhaps understood by some as important for its own sake. But given the thorough and alarming abuse of legal values in our final example, K. seems quite fortunate and his frustrations look like mere inconveniences. In between, we have mid-range, perhaps more common examples where so-called law is abducted to serve partial and selfish interests. But they fall short of the horrifying evil of Rubashov's experiences .

How should we describe the practical context of law? What relevant themes emerge for analysis and criticism? The most important and obvious feature of the practical context of law is that real persons are directly affected in harmful as well as beneficial ways by law. A theory of law, especially one interested in evaluating the effectiveness and justification of law must consider this vital point. If effectiveness and justification are proper objects of legal theory then, logically, it seems that such a theory should specify how law may not be just anything or be used in just any way at all. So, in addition to focusing on the ways in which subjects themselves are and ought to be involved in law, we need to examine the role of officials or legal authorities. What constitutes appropriate standards for the determination and application of the law? In other words, when and how is the application and enforcement of law justified? The practice of law must have some points upon which this justification is based. Finally, assuming that such standards can be identified and argued, what are the implications of this for further standards of behavior, especially that of citizens and subjects? What sorts of responsibilities do officials have toward the practice of law or toward those subject to it? What sorts of obligations, if any, do citizens have in relation to the law? These and other questions constitute the main analytical and critical themes of this dissertation. In particular, we plumb the depths of natural law theory and legal positivism for our answers.

Here, stated briefly, is the main problem I see with legal positivism with respect to the question of justification. Legal positivism overemphasizes the formal and logical features of law and legal practice. This has curious effects which will become more clear as the argument develops. Legal positivism at once improperly narrows and enlarges the scope of law in relation to practical and moral concerns. On the one hand, legal positivism confines adjudication to areas or affairs which have existing formal or authoritative sources. If such sources exist, legal decisions are justified by reference to them. In what seems to be assumed as the normal case, these *non-moral* sources provide judges with *sufficient* justification for coming to their decisions in the first place, and for applying and enforcing them in relation to subjects in the future. If they do not exist, then legal positivism allows that judges simply will no longer be guided by accepted or recognized judicial institutions, practices, and standards. Thus the narrowing of judicial practice. At the same time, legal positivism admits that these same decisions justified in a sufficient way through their connection with formal sources *need not* additionally be morally justified. Here, I think it inappropriately enlarges the formal logic, scope, and power of law. If this does not imply a logical inconsistency, that is, as exemplified in the statement 'action X is legally but not morally justified', it certainly implies impracticality and, in common cases, what must be viewed from the standpoint of legal positivism, as an opportunity for legally acceptable albeit unfortunate instances of immorality and evil.

The logical implication of this tension is that the production of great moral evil is comfortable and consistent with this theory of law so long as legal positivist terms of identification and justification are met. We need to explore the bounds or limits of this relationship. Can it be possible that the concept of law including its justificatory dimensions is apathetic to moral ends of any sort? Or is it possible that the justification of law and legal decisions can properly occur without any necessary and serious consideration of the practical relationship between law and those subject to it or of the practical and moral interests of such persons?

It is important now to set out the reasons why I think legal positivism is so inadequate and undesirable a theory of law along side natural law theory. There are three main reasons here, the first two are practical, and the third bears on academic concerns. All are interrelated and involve serious shortcomings. The first two are implicit in the discussion above, the last involves new issues. The risk in setting out such reasons at this early stage is that they may not be entirely clear until supplemented with the arguments of the coming chapters. Nonetheless, since I think legal positivists are wrong, I should say how so and why.

First, legal positivists fail to consider important aspects of the relationship between power and law. Law, of course, comes to us standardly with a monopolization of coercive force. This is not to say that private armies (mafias, inner city gangs, and Pinkertons) do not exist or exert force illegally and legally in law-based societies. It is to say that law-based societies monopolize the public use of force and the use of force for public purposes. Another part of the *power* of law may be attributed to morality. Legal positivists should not disagree with this observation. Many people obey the law as a matter of moral choice whether concerned with the broad values of citizenship and law abidingness, or the specific value associated with a particular law like the connection between public safety and laws against speeding. But according to legal positivism, the justification of a law or the justification of the application of a law presupposes neither of the above aspects of power. While I do not think there is any important relationship between justification of authoritative decisions and the capacity to monopolize force *simpliciter* , I think that it might be worth exploring the relationship between such justification and the monopolization of force for *public* purposes such as safety and welfare for all. But legal positivists invest the *logic* of valid law with sufficient power to justify decisions in law. Unfortunately, in my view, the logic of validity allows us in the same breath and apparently without much trepidation to speak of *Nazi* law, the law of *racist* South Africa, and the law of *socialist* Sweden. The logic of validity, therefore, does not allow either the species of Rubashov's fears or the genus of, say, Camus' concerns about "crimes of logic" [5] to step in the way of the justification of law. It is wrong to invest a theory of justification with such force. I think the wrong is two-fold. The *moral* wrong is clear given our practical and historical experience, and the apparent indifference of legal positivism to this is disturbing. M.J. Detmold [6] powerfully characterizes the problem noted immediately above in the following excerpt, however, the emphasis is mine:

> The *form* of all rules evidences, invariably, an act of formidable audacity: no part of moral thought which might otherwise influence judgement in the matters covered by the rule is left to stand. Law, that vast array of rules, is precisely this, the clearest example of it; it is a settlement, an end to questions, a substitution of certainty for truth; it is a reduction to the grasp of men of the mystery of things.

In addition to the under-treatment of the relationship between power and law, I think that the theory of justification of law employed by legal positivists is wrong at a conceptual level. This, along with the discussion above about how legal positivism ignores important practical and moral aspects of judicial practice and the relationship between officials and citizen-subjects, constitutes the second reason or sense in which I think legal positivism is wrong. I think it *misdescribes* the behavior of those individuals involved in identifying, applying, and following the law.

Third, I think legal positivism does a disservice to academia by contributing to the segregation of the subject of law from subjects of politics, ethics, and social studies. Legal positivism promotes an artificial compartmentalization of thought about these subjects. Of course, they are not the only, nor perhaps even the worse culprits here. Given the concerns of the first two reasons, this compartmentalization amounts to a brutal simplification of the relationship between ideas and their practical contexts.

All of this invites some speculation about why legal positivists persist in their endeavor. I can think of several reasons all of which are discussed in more detail in the coming chapters. First, the legal positivist project seems to involve certain philosophical commitments. These include *positivist* pretensions. At least there seem to be vestiges of positivism here in the sense that there remains a logical divide between social facts and moral values. I discuss this more in the next chapter. Second, legal positivists are impressed by the "benefits" associated with modern systems of law employing the criteria of validity. They explicitly identify benefits and burdens and believe that the trade offs are worthwhile. Yet the standard or standards of worthiness are neither well explicated nor defended. Third, I think we can say that legal positivists have an institutional interest in maintaining the academic division of labor referred to above. Law school and the study of law enjoy a status unusual in and far more prestigious than what is the norm for other fields in the broad area of social study. It should be clear from this that I do not attribute any sort of maleficence to legal positivists. I do however think they are confused.

In the following chapters I examine all of these questions. In the next chapter, I set out the logic, structure, methodological assumptions, and theoretical objectives of legal positivism. In particular, I examine the content of and relationship between the social fact thesis and the separation of law and morality thesis. In Chapter Three, I expose what may seem to be some rather curious moral concerns and interests of the major proponents of legal positivism including John Austin, H.L.A. Hart, and Joseph Raz . I am particularly concerned to try and understand the point of these undertakings and their relationship to the allegedly distinct and independent concern to identify law apart from any moral evaluation or justification at all. In the end, I argue that legal positivism's moral concerns are question-begging, and that when taken together, the two enterprises noted above seem inconsistent with each other. The next chapter puts forward the critical format for the rest of the dissertation and initiates the action plan by focusing on some internal inconsistencies, ambiguities, and other weaknesses in legal positivism's treatment of law. Chapters Five through Nine taken together compose a general theory of natural law theories. Chapter Five sets out the epistemological framework of natural law theory focusing on the defining dimensions of ethical naturalism, non-consequentialism, and the rejection of the social fact and separation theses. In Chapter Six, I classify natural law theories as either conceptual, procedural, or substantive theories, and undertake an exposition of the content of conceptual theories. Chapters Seven and Eight focus on procedural and substantive theories respectively, most importantly including those of Lon Fuller, John Finnis, and Jean-Jacques Rousseau. In Chapter Nine, I focus on the critical concept of the *integrity of law* which I argue is implicit in natural law theory. Here, I defend ideas about proper justification, the appropriate relationship between officials and citizen-subjects, the relationship between law and evil, and the importance of securing respect for law. In relation to each of these ideas, I review and draw out the critical implications for legal positivism. Chapter Ten summarizes the argument and provides some concluding thoughts. My intent in this dissertation is not to defend any particular natural law theorist's point of view, but to defend a set of broad ideas I understand as essential to the general theory of natural law. Though these ideas are broad, I think they are sufficiently defined so as to have clear theoretical and practical value.

I think a brief word about my choice of particular natural law theorists is in order. Out of the major political philosophers, it may seem strange to focus on Rousseau, rather than, say, Aristotle or some other classical natural law theorists. For many would agree that Aristotle, for example, enjoys a reputation as the founder or one of the founders of natural law theory, whereas Rousseau's relationship with natural law theory is complicated and controversial at best. First of all, I have not ignored Aristotle, indeed his thought permeates the dissertation given its strong impact on Finnis' work. But it makes far more sense to get at Aristotle through Finnis since the latter is explicitly concerned to defend a particular natural law theory and considers Aristotle in the process. In any case, I think Finnis provides more food for thought than Aristotle on the subject of natural law given his sharp, unwavering, and detailed focus on the concept of law, and given his status as one of the few leading contemporary philosophers of law. I return briefly to the question of the relationship between classical, modern and contemporary proponents of natural law theory in Chapter Five.

So why bring Rousseau into the picture? As we will see, looking at Finnis and Rousseau together offers many interesting juxtapositions on the issues. I argue that the affinities between them constitute some of the core commitments of a general theory of natural law theories. At the same time, the differences between them often exhibit well the range of positions which can be taken by particular theorists on particular issues. Of course, here I am presupposing what must still be shown, that is, that Rousseau is a natural law theorist. The secondary literature on Rousseau is controversial on this subject. So, in part, I am motivated by this challenge itself. Next, even though Rousseau, who died in 1778, is far from a contemporary, he was keenly aware of the modern political and social changes being wrought by liberal-democracy and by material and economic progress. His insights into the roots and nature of modern change are useful in our analysis of the relationship between morality, politics, and law. Finally, it is clear that Rousseau himself explicitly attended to the relationship between nature and law. He speculated about the movement away from natural relationships to social ones including those defined by legal and political institutions. He also developed a theory of law as the "general will". It was Rousseau's discussion of the nature of law and its relationships to morality and politics which initially engaged my own wider interest in legal theory, that is, primarily in legal positivist and natural law theories in particular. So another reason why I include detailed discussion of Rousseau in this dissertation concerns my own interest in understanding his relationship to the broader field of legal and political theory.

Chapter Two

In this chapter I set out the general characteristics of legal positivism as these are identified by the main contemporary proponents of this theory of law. We can, I think, suppose that these characteristics define the general concerns of legal positivism through the ages. As we will see, there is evidence that the contemporary proponents understand themselves as remaining true to legal positivism as a general approach to law. Of course they claim to refine and further explicate the approach. Because of this, I do not claim that my own analysis is free of interpretation. At the same time, I do not intend this chapter to be primarily evaluative. Here I am trying to expose the logic and structure of legal positivism as a theory of law. Indeed the effectiveness of internal and external criticism of the theory presupposes that a primarily descriptive effort be made first. So, in this chapter, I first identify legal positivism generally as a social-scientific endeavor. But, straight away this calls for some interpretation, since social science itself comes complete with its own motivations and valuations. Second, I identify the main structural dimensions of legal positivism which serve to establish its logic and so accomplish the objectives of the theory.

Legal Positivism as Social Science

I want to make one perhaps highly controversial claim at the start. Legal positivism is positivism or at least it has serious positivistic pretensions. Now I do not mean that legal positivism is architectonic, or deterministic, or evolutionary, or historicist, or social-Darwinistic. Legal positivism does *not* expect science or social science to discover immutable laws of human behavior which will allow us to step free from our philosophical-theological ball and chain. At the same time, it seems fair to say that many contemporary legal positivists generally seem skeptical about the possibilities for objective morality especially as this relates to a proper understanding of the nature of law and legal practice. Along with this, legal positivism, like positivism, assumes: 1) the availability of *objective* non-moral social facts; 2) that the *identification* of such facts is necessarily detached from moral explanation or evaluation; 3) that scientific or empirical methods are available to identify this narrow range of *social* facts; 4) that these methods describe experiential data which account for and sufficiently *justify* aspects of *normative* behavior including the official use and acceptance of legal norms and general conformity to them.

I want to make this very clear. Legal positivism has serious positivist pretensions because of the assumptions it makes about the sufficiency of non-moral social facts with respect to the question of the justification of normative behavior associated with legal practices. Moral argument is not necessary for the determination of the existence *or* legal justification of law and judicial decisions in law. For here we establish the existence of a law by locating it within an internally justified legal system. Legal positivism wants to provide an *independent* non-moral account of normative behavior through non-moral interpretations of concepts such as justification, authority and obligation applied to social practices. But, I argue these practices include clear and inseparable *moral* matters of life, freedom, equality, justice, basic human needs etc. So there are clear positivistic pretensions here. Legal positivism may not want to *reduce* moral concepts to social-scientific ones. But it surely intends to *create* non-moral or legal analogues to moral concepts. Legal positivism claims that we can, indeed should, understand aspects of the normative behaviors involved in the identification, determination of content, use, acceptance, justification of law and legal standards, and assignment and enforcement of legal obligations *as* non-moral events. My contention is that this effort is highly suspect especially in the areas of justification and obligation because it ignores the practical context of law.

Why? That is, why should we go along with legal positivist claims here? What benefits may we receive from this commitment? Two reasons crop up frequently. Near the end of H.L.A. Hart's seminal work , The Concept of Law , he writes that the adoption of legal positivism over natural law theory will "assist our theoretical inquiries [and] advance and clarify our moral deliberations." [1] In a nutshell, the advances in legal theory Hart has in mind are of course the differences he develops between his own theory and the older, more classical version of legal positivism supplied by John Austin. Soon we will explore these details. But for now we can say that according to Hart, Austin's legal theory requires a concept of *rules* in order to see how legal systems persist and develop over time. Rules better define the operation of a modern legal system than Austin's concepts of "commands", "habits", and a "sovereign". In addition, Hart argues that the analysis of law in terms of rules throws various moral issues into better relief.

Joseph Raz echoes Hart on the question of benefits in his essay "Legal Positivism and the Sources of Law". Here Raz focuses on both of the above aspects when he writes that legal positivism "explains and systemizes" many of the common distinctions made between what judges do as they "apply the law and develop it" through the use of "legal skills" and "moral arguments" respectively. But, I think more importantly in terms of persuasive argument, this allegedly accurate description of judicial activities illustrates how the legal system as a whole functions to achieve "patterns of forbearances, co-operation, and co-ordination between members of the society or some of them" and thus provides us with "sound reasons for adhering to [legal positivistic] conceptions."[2] Interestingly, as understood by legal positivism, none of these justifications of legal positivism seem to be part of the necessary justificatory datum available to judges when they decide to apply laws. Thus, Raz justifies the adoption of legal positivism over natural law theory on the basis of its contributions toward an accurate understanding of what judges do, and in so doing, it shows how legal systems bring about a certain sense of social order. The suggestion is that we should accept legal positivism as the most defensible theory of law because : 1) it describes best the workings, including justificatory processes, basic and internal to a legal system; 2) it accurately distinguishes between moral and legal concerns; 3) it accounts for the most important end, purpose, or function of a legal system.

Legal positivism as a social science then claims to achieve certain kinds of knowledge. Primarily, this is knowledge about how to identify the laws of a legal system, an account of the nature of legal authority, justification, and obligations, and an account of the causes of relevant, that is, distinctly legal normative behaviors. We should add that legal positivism claims to provide *near-universal* knowledge about social and legal systems. For it wants to capture basic and fundamental features of the modern or genuinely "legal world" as opposed to "primitive" or "pre-legal" forms of social structure. [3] Recently, Hart affirmed the "need for a clarifying, descriptive enterprise which would answer such questions as I have mentioned [in the Concept of Law] and would have some claim to universality." 4 In terms of our own later critical evaluations then, we should pay attention to legal positivism's answers to questions about, for example, what is most important for judges to do and what we expect legal systems to achieve?

Legal positivism as a theory of law *identifies* laws and the content of laws without reference to moral argument. Rather, it employs the criteria of legal *validity* for these and other purposes including the establishment of the legal authority and justification of laws and their obligatory status. Thus, the identification of law is said to be morally neutral. In other words, it would seem that in most if not all cases judges should be able to identify the law and be justified in applying the law without any necessary resort to moral principles or rules. We can see in this general description of legal positivism the outlines of its two main theses: 1) the social fact thesis; 2) the separation thesis. In terms of methodology, the first thesis provides the epistemological instruments sufficient to identify laws and justify their application. The second thesis asserts that there is no necessary relationship between law and morality with respect to the content of the former. The content of law is strictly determined by the non-moral terms and conditions of its existence. Of course, all these claims and the alleged relationship between the two theses are controversial. For now we will turn to an analysis of the content of both theses.

The Social Fact Thesis

Laws are understood in legal positivism to exist as social phenomena or entities capable of relatively unproblematic observation. In other words, we can say that laws can be shown to exist without recourse to problematic or controversial moral discourse. Laws exist when rules are effectively recognized, practiced, and followed by officials and subjects. Consistency between basic legal rules and principles as well as the presence of sanctions and legal institutions helps to guarantee the effectiveness of a legal system. Simply put, laws exist when they meet the criteria of validity and other conditions of existence. It is the social fact thesis which sets forth proper tests for the identification of law and the criteria of validity. These tests show laws to be species of social facts through the employment of supposedly morally neutral instruments. The concept of validity is essential to the legal positivist approach to law and differences about the nature of validity between proponents seem unexceptional. At the same time, the exact relationship between the social fact thesis and the separation thesis is unsettled or imprecise within the theory of legal positivism, and the philosophy of law more generally. But Raz argues that "the moral thes[is does not] follow from the social one." [5] My argument here is that , on the contrary, a *version* of the former thesis does indeed follow from the latter thesis.

The social fact thesis is the more basic of the two theses. For it is, as Raz says, "at the foundation of positivist thinking about law" and "indicates the view that the law is posited [or] made by the activities of human beings." [6] The priority of the social fact thesis over the separation thesis is further suggested by the fact that Hart seems recently to have backed away somewhat from the separation thesis but still sees a need to use the social fact thesis in the determination of differences between law and force, legal and moral obligations, and the relationship between rules and law. [7] Related to this, Raz holds that the social fact thesis is "compatible" with some natural law views including the idea that there might be a "necessary connection between law and popular morality" and that the claims of legal authorities are "justified" or at least justifiable. [8]

As I mentioned at the outset, some ideas hold legal positivism together through the ages. The most important of these is the idea that law is a matter of social fact. Law is something "laid down" or *posited* by human authorities whether these be Austinian "sovereigns" or judges citing Hartian "rules of recognition". Humans or human institutions are responsible for positive law. As David Lyons says, determination of "the existence of a law and what it requires or allows is to engage in an inquiry into the relevant facts...To determine such facts is not to judge them." [9] The second part of this statement is vital. Without it, the social fact thesis seems trivially true. For unless we believe in divine intervention, only humans can make *their* laws. The question is whether or not the identification, application, justification, and even the development of laws necessarily requires recourse to moral argument. Legal positivism generally denies this. Indeed, Hart writes explicitly that "the errors of [Austin's] simple imperative theory are a better pointer to the truth than those of its more complex [and historically prior natural law] rivals." [10] Legal positivism as a general theory has "perennial attractions whatever its defects may be." [11] What are these attractions? According to Hart, theorists like Austin were trying to promote "clarity and honesty in the formulation of the theoretical and moral issues raised by the existence of particular laws which were morally iniquitous but were enacted in proper form."[12] In other words, all legal positivists share a commitment to the social fact thesis which of course identifies the ways in which laws become enacted in proper *form* .

What are the terms of the proper enactment of laws as developed by Austin? First, we should see that he defines laws as commands: "Every *law* or *rule* (taken with the largest signification which can be given to the term) is a *command.* Or, rather, laws or rules, *properly* so called, are *species* of commands...A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire." [emphases in the original] [13] Second, he identifies the source of commands or laws as the sovereign. Sovereignty implies an "independent political society" in relation to which "The *bulk* of the given society are in the *habit* of obedience or submission to a *determinate* and *common* superior...[which itself] is *not* in a habit of obedience to a determinate human superior." [emphases in the original] [14] Finally, the terms of enactment or the criteria of validity establish the existence of law independently of moral evaluation. In a response to William Blackstone's view that human laws cannot contradict the laws of God, Austin wrote : "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."[15] So if we can locate this particular type of sovereign-subject relationship, we can locate the laws of this society and others like it.

Again, Hart praises Austin for his ideas that laws emanate from social facts, like the habitual and general conformity of subjects to law, and that the determination of these social facts is an empirical matter. At the same time, if they are sound, Hart's criticisms rather devastate the rest of Austin's theory. First, Hart finds the notion of laws as "commands" too narrow since it allegedly cannot account for the presence of "power-conferring" laws. Commands seem appropriate for description of perhaps many criminal laws especially given the looming presence of sanctions or punishments. But what about laws which grant options in liberties or privileges? [16] Second, the idea of a sovereign "not in the habit of obedience" does not easily illustrate how laws can be said to apply to all.[17] Third, the idea of a sovereign originating every law through tacit or explicit expressions does not account well for how custom becomes law. [18] Fourth, the characterization of rule-accepting and following behavior in terms of "habit" does not explain the continuity of law between governments. [19] Finally, the idea of habitual behavior does not account well for the persistence of law over time. [20] As a remedy for these defects, Hart suggests a richer notion of *rules* and official acceptance of them.

It is important to note again that all legal positivists accept the social fact thesis. This means that the identification and application of laws is a function of the observation of relevant facts, none of which includes or requires moral argument. The difference between the views of individual positivists concerns the scope or range of social facts. As we have seen, Austin confined social facts to a few characteristics defining the relationship between sovereign and subject. But we might also consider that other relationships such as those between officials and officials, officials and the enterprise of law, officials and subjects, subjects and the enterprise of law, and internal relationships between various sorts of rules might compose the law. Hart considers some of these relationships at least.

Hart introduces the notion of a "secondary rule". Such rules supplement, explain, prioritize, tie together, and justify "primary rules". The latter "are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves." [21] In other words, secondary rules are rules about rules, or about rulers, or about the ruled themselves. Hart discusses three kinds of secondary rules including "rules of recognition", "rules of change", and "rules of adjudication". [22] The first kind of rule establishes the authoritativeness of primary rules by showing that such rules issue forth from recognized legal authority, for example, the simple rule that 'all rules etched on the stone tablet by the Most Distinguished Non-Delineated Delineator shall be understood as the laws of the land' or the somewhat more complex rule that 'all laws must originate as Orders-in-Council through the sovereign in the legislature'. Rules of change might include more or less open grants to a specified body to introduce new laws, or set out legislative procedures, or identify how basic constitutional principles might be amended. Rules of adjudication identify the ways in which various civil, criminal, jurisdictional, and constitutional disputes will be dealt with.

It is important to recognize that each of these rules serves to establish different social sources of law and hence define some of the relevant *social facts* important for the identification and proper application of laws. The main idea here of course is the necessity of tracing primary rules back to one or more secondary rules. Further, Hart writes that "from the combination of the primary rules of obligation with the secondary rules of recognition, change, and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist." [23] Here Hart is referring to theoretical problems surrounding concepts like authority, rights, obligation, and the state. Most importantly for our analysis we must now see how this internal relationship between rules themselves becomes important in the relationships between officials and the enterprise of law, and officials and officials.

Officials must have certain attitudes with respect to the system of rules described above, and this attitude would seem to help define the necessary or proper relationship between officials themselves. Briefly put, officials must *accept* the laws, especially the secondary rules governing recognition, change, and adjudication. As Hart says "[officials] must regard these as common standards of official behavior and appraise critically their own and each other's deviations as lapses." [24] Official acceptance seems to boil down to the observation that officials are in fact *using* the system of interlocking primary and secondary rules. They might, for example, cite even more basic general and common standards as reasons for applying these and other standards to particular cases. Officials need not have any other special reasons for applying the law than the fact that rules are accepted by officials. The fact that a general rule authorizes application of another narrower rule to a particular case is sufficient justification for such a decision. Further, official use or acceptance of rules must not be coerced. Hart writes that "some at least must voluntarily co-operate in the system and accept its rules." [25] Acceptance then implies the presence of an "internal point of view". This means that officials must have a special attitude with respect to, but not necessarily respectful of, the law and perhaps toward each other that subjects need *not* have. The defining features or *social facts* of acceptance or the internal point of view are 1) the application of general and common standards to oneself and to particular cases; 2) uncoerced use of these standards.

This internal attitude with respect to the system of rules must necessarily influence the relationship between officials and officials. For how could there be a genuinely "unified or shared official acceptance of the rule of recognition" without this? [26] Unfortunately, Hart does not discuss this relationship in any detail. But it seems obvious that officials would have a stake in maintaining a certain degree of integrity within the ranks of officials themselves. This seems to be implied by some of Hart's discussion. For example, when judges apply the law they certainly must recognize this as obligatory not just for themselves but for *all* officials, or at least consider it obligatory for all judges to take their decisions seriously in their own deliberations. Further, many rules, especially rules of adjudication, serve to maintain judicial institutions and practices themselves. So there must be some special concern that officials should have for other officials which helps to maintain these institutions and practices too. [27] Now Hart does not identify this aspect of the internal point of view as a necessary condition for the existence of law, so I will not count this as a relevant *social fact.* I mention it here only because it seems to be implied by the description of the attitude officials must take toward the rules. Later, we will return to this issue from a critical perspective.

The terms of the relationship between officials and subjects in relation to the determination of relevant social facts and the existence of law is also a little unclear. Officials have obligations to apply valid law. Such obligations cannot be construed necessarily as legal ones. Are they moral? If so, are they obligations to anyone generally or in particular? If they are moral obligations to subjects in general they do not seem to amount to much since proper application of the law may lead to a situation whereby the "society in which this was so might be deplorably sheep-like; the sheep might end in the slaughter-house ", or where persons other than officials might be "malefactors or mere helpless victims of the system" or where general conformity might be "motivated by fear". " [28]

Officials also seem to have obligations to follow certain principles of legal justice such as impartiality, and treating like cases alike, and disallowing persons from being judges in their own cause. But Hart seems to treat these simply as aspects of the general notion of "proceeding by rule" [29] and so leaves the relationship to *judicial* role-related responsibilities and obligations to to the practice of law, and to subjects uncertain. Because of this, we must conclude that there are no relevant *social facts* to be drawn out of the relationship between officials and subjects for the purpose of identifying and applying laws except that presumably what judges do must be consistent with the possibility of general conformity. In other words, they, and other officials, must stay in power and continue accepting or using the rules of recognition.

Finally, we need to describe the relationship between subjects and the law. Hart is straightforward here. All that is required of citizens is obedience but there is no general obligation to obey or even respect the law. There is a requirement constituting a relevant *social fact* that the laws "which are valid according to the system's ultimate criteria of validity must be generally obeyed."[30] Obviously, only subjects can satisfy this condition. The condition may be satisfied, as it cannot be where judges in their relationship with secondary rules are concerned, even if subjects generally conform to laws "out of fear of the consequences" of not doing so. [31]

Hart's description of the social fact thesis may be summarized in the following way. In order for particular laws to be said to exist: 1) they must meet the strict requirements of validity established through the relationship between primary and secondary rules; 2) the officials must have internal attitudes with respect to secondary rules ; 3) the primary rules must be promulgated by the authorities and generally obeyed by subjects. Here the relationship between the criteria of validity and conditions of existence seems quite clear. The former constitutes one of the conditions for the existence of law.

But astute readers will question Hart about the problem of reduction here. If most rules attain validity through their relationships with more basic, secondary rules accepted by officials, what is the basis for the validity of secondary rules especially if they are in dispute, or indeed, what is the basis of the "ultimate rule of a legal system" itself? [32] Presumably disputes would be settled by courts and the role of the courts here would be specified in terms of rules of adjudication and the rule of recognition itself. But the validity of the "ultimate rule of recognition", the existence of which seems to have some logical necessity to it, must depend on conventional acceptance alone, that is on the fact of uncoerced use of it as a standard by officials, since it cannot have any further systemic relation to more basic rules. [33] So there seem to be two types of validity conditions; 1) a logical or systemic relation between a primary rule and a secondary rule(s) plus official acceptance of the latter; 2) official acceptance of a secondary rule (the ultimate rule of recognition) alone. Whether or not this betrays some internal or other inconsistency or weakness of argument will be discussed later.

Other legal positivistic theorists such as Rolf Sartorious follow Hart's description of the existence conditions outlined above. At times though, Sartorious seems to narrow Hart's conditions, other times he seems to expand them somewhat. For example, he suggests that in simpler societies where officials and deviations from secondary rules are few, officials might *not* obviously or observably accept rules in the internal sense described above though they will enforce them. [34] Later, he seems to add a condition to the relationship between subjects and the law which Hart ignores. For subjects or citizens seem normally to do more than simply conform to rules. A condition of obedience seems to be a *belief* "that there exists a set of constitutional rules, accepted by officials, which determines what 'the law' is which he is required to obey." [35] It seems clear that Sartorious does not take this to be a necessary condition of existence. In any case, there is no disagreement between Sartorious and Hart on the central point of the social fact thesis. The existence of law is a matter of social fact not moral argument or evaluation.

Raz makes this entirely clear with his "strong" sense of the social fact thesis. For Raz the sense of social fact or source "is wider than that of 'formal sources' which are those establishing the validity of a law (one or more Acts of Parliament together with one or more precedents may be the formal source of one law). 'Source' as used here includes also 'interpretive sources', namely *all* the relevant interpretive materials." [my emphasis] [36] Presumably, then, this could include the *Holy Bible* or the ancient Indian *Vedas* or Colonel Quadafi's *Green Book* or perhaps Lieutenant Colonel Oliver North's reputed *Emergency Guidelines Governing Suspension of the U.S. Constitution* . The effect of Raz's "sources thesis" is to ensure that "the existence and content of every law is *fully determined* by social sources." [my emphasis] [37] Further, moral sources *might* be referred to but only if a valid, legal, referential rule explicitly identifies the relevance of a particular moral source or otherwise grants authority to consider moral sources. But since morality must be resorted to at the behest of *valid* rules, "the morality to which it refers is *not* thereby incorporated into law." [my emphasis] [38]

I will not comment in much detail here on the tension between this wide view of social sources and the idea that the social facts relevant to the determination of law are supposed to be non-moral. But at first sight, anyway, the wide view seems to beg some questions. What does Raz mean by all the "relevant" materials? What's relevant and what isn't? Do moral principles of any sort count as good candidates for sources ("interpretive materials") of law? Is the *Bible* obviously a *non-moral* source? What of Kant's *categorical imperative* ? If not, how does understanding these as a *social* sources support the general thrust of the social fact thesis which requires the identification of law be made without moral argument? Does the *Bible* , or say even a set of basic principles of liberalism understood as possible interpretive materials, adequately show how law is posited according to value-neutral terms?

Since Raz holds that the law is to be understood as *fully* determined by its social sources, and that such sources which include *all* interpretive materials must be mediated in hard cases by referential rules, a version of the separation thesis seems to follow from the strong social fact or sources thesis. For Raz seems to be saying that while the weak social thesis (the one which, like Hart's, counts general conformity, official use and acceptance of rules, and the union of rules as relevant social facts but tends to leave the question of the nature of *sources* and their relationship to rules unexamined) allows for the incorporation of morality into law via direct judicial use of moral principles and argument *where* the law itself is unsettled [39], the strong social thesis disallows *any* , even contingent moral content from entering into the law because all judicial references to morality in circumstances of unsettled law *must be* controlled by valid legal rules with their own social sources. Allowing for the contingent incorporation of moral content into the law would contradict the idea that "the existence and content of every law is fully determined by social sources." In a hard case, full determination is guaranteed by the availability of an appropriate existing valid, referential rule which authorizes use of moral principles, whose own social sources must be non-moral, and probably formal, in nature. In validating the use of moral principles through legal rules, the moral content of the former is not drawn into the law.

It seems that the social fact thesis must be "strong" in order to: 1) adequately secure the idea that the identification of law involves *only* social facts and that the use of these facts is controlled by the logic of validity ; 2) protect the independence of legal *justification*. Moral content *in* the law would upset the sense of legal justification used by judges based solely on the criteria of validity. Point one secures the explanatory value of legal positivism given that the social fact thesis is so central to it. So, apparently, we must understand that in the event that the law is unsettled or controversial, moral argument may be resorted to, but *not* without the mediation of a valid referential rule. With regard to point number two above, Raz discusses the importance of legal justification as it relates to legal obligations. He argues that the strong social thesis best identifies the way in which legal obligations are considered "binding regardless of any other justification."[40] I think the justificatory dilemma for legal positivism posed by allowing the incorporation of any *moral* content into the law is quite clear. Now, as we saw in the three paragraphs above, Raz seems to invest such rules with the *logical* power to deny entrance of moral content into the law, thus implying a version of the separation thesis.

If all of the *sources* of law are social, and any moral argument about the determination of laws must be guided first by the logic of validity or the availability of valid legal *rules* , how could the law ever incorporate moral content? Where could the moral *content* of a law come from if not from an *unmediated* moral source? I discuss this problem at length in Chapter Six and below. At the same time, according to Raz, law may have other, even necessary, moral *features* including, for example, the possibility that legal systems as wholes may be morally justifiable, connections with the conventional morality of particular societies, and the possibility that some uses of rights and duties in law may be moral.

Now I am reasonably certain that Hart's discussion in the Concept of Law falls a little short of Raz's strong social thesis. The question is what are the logical implications and practical consequences of the existence and application of referential laws for the content of law? Hart argues, as we have seen, that "the existence of a legal system is a social phenomenon" because of the presence of internal attitudes, adjudicative institutions, general obedience, and the union of primary and secondary rules. These arguments are in lock step with Raz's notions of "efficacy" and "institutional character", but according to Raz, they may only define a "weak" sense of the social fact thesis because they leave the explanatory significance of social sources open or ill defined.[41]

Hart does recognize that law "at all times and places has in fact been profoundly influenced by conventional morality [and by] individuals whose moral horizon has transcended the morality currently accepted." [42] Law cannot have just any content, that is, there must be some laws sanctioning "minimum forms of protection for persons, property, and promises" given the force or "natural necessity" of certain very basic human needs. [43] Such needs can be explicated as "principles of conduct". [44] At the same time, Hart says that there is no necessary "specific conformity" between law and morality. Neither must the "criteria of validity" include any tacit or explicit reference to morality. [45] Given this last statement, in order to preserve consistency here, we must interpret Hart as assuming that the "principles of conduct" associated with the necessary incorporation of "minimal forms of protection" into law are themselves *not* moral principles and that the content itself fails to meet the requirements of "certain" or "specific" moral content. Still, the logical relationship between the idea that law "at all times and places" is influenced by conventional morality and the idea that no legal reference to conventional morality is necessary seems rough. I discuss both of the last points again in Chapter Four. It is important to see here that Hart leaves the door open to the possibility that law may incorporate "specific" moral content on the basis of a coincidental relationship between legal and moral principles. This is precisely what Raz's strong social thesis disallows.

I will not comment about whether or not this last consequence is acceptable to legal positivism as a whole. What seems certain, though, is that: 1) the "strong" version of the social thesis ought to be preferred by legal positivists if they are interested in securing full explanatory significance for the social fact thesis including the idea that laws are fully determined by social sources and that a consequence of this is the creation of a distinctly legal form of justification; 2) acceptance of the "strong" thesis implies a possibly unacceptable consequence about the relationship between law and morality for legal positivists if I am right about the impact of the *logical* force of validity on the determination of law in hard cases.

We should note that Raz himself is not always clear about the relationship between the weak thesis, his strong social fact thesis and the nature of legal positivism. For he writes that the statement (compatible with the weak version of the social thesis): "Sometimes the identification of some laws turns on moral arguments...is on the borderline of positivism and may *or* may not be thought consistent with it." [my emphasis] [46] At the same time, Raz asserts that he will go ahead and "argue for the truth of the strong social thesis." [47] Raz seems to be saying that legal positivism is comfortable with the idea that some probably small portion of law may be unsettled because morality itself is unsettled. In such cases, morality might form *part of* the sources of law, but there is nothing *necessary* or inevitable about such occurrences. On the other hand, legal positivism *properly* understood is not comfortable with even the contingent or accidental incorporation of moral content into the law since the morality referred to by a referential legal rule is not incorporated into the law and that the full determination of the law by social sources requires referential rules in hard cases.

Legal positivists, including Hart, ignore the rather hard logic of validity attaching to the last point above. For assuming the necessity of adopting the strong thesis given its relation to explanatory value, resort to moral principle and argument still must be governed by a legal rule. But this authorization draws the so-called *moral* source into a different world of logic and reason. Moral principles cannot survive the requirements of membership into a legal system based on the criteria of validity. Moral principles come to a legal system *after* being located by a valid rule. Further, the attractiveness of a moral principle to a judge seems to become its *availability* as a so-called moral source , and this availability is controlled by the logic of validity. Arguably this relationship to law waters down, and in some ways replaces, the force of moral principle and argument. For example, moral convictions and commitments may weaken, and the independence and value of arguments based only on practical and moral considerations must be ignored and may be forgotten. In any case, if the coincidence between law and morality allows that a small portion of morality might be incorporated into law, this seems to damage the case for the independence of justification based on the criteria of legal validity. Given the logical independence of justificatory reasons based on validity what can it mean for morality to be *part of* law?

In conclusion, on the one hand we can see that adoption of the strong social thesis is necessary in order to secure the explanatory value of the social fact thesis itself. Legal positivism ought to say that law is fully determined by social sources governed by the logic of validity and that legal justification follows according to the same logic. On the other hand, there seem to be some possibly unacceptable consequences of adopting this view for the understanding of the relationship between law and morality given the force of the logic of validity.

Further, we can say that all legal positivists argue that the criteria of validity are sufficient with respect to the identification of laws and the justification of the application of such laws. There may, however, be some disagreement about the relationship between the criteria of validity and the moral content of law. We can also say that there is much agreement about which social facts are relevant to the existence of law. No one disagrees that systemic relations between rules, general obedience, internal attitudes of officials, and adjudicative institutions are relevant social facts which combine to form some of the social sources of laws. We can say that legal positivism denies the importance of moral relations between officials and officials, officials and subjects, and subjects and the law with respect to the questions of legal authority, rights, and obligations. Finally, we can say that legal positivists agree that the definition of the existence of laws through observation of relevant social facts is a separate or independent matter from the moral evaluation of such laws.The critical argument of this dissertation focuses on appropriate forms of justification and role-related responsibilities in law.

The Separation Thesis

The separation thesis presupposes the idea that one cannot evaluate law from a moral standpoint until one knows what the law is. This is solid enough but does not necessitate adoption of the social fact thesis and acceptance of the implications of this as described above. The broadest interpretation of the separation thesis holds that no *necessary* connections between law and morality can be found inside *or* outside of the content of law. Any overlap between law and morality is contingent and indefinite and relative due to a variety of considerations. In this dissertation I am mainly concerned with the relationship between morality and the content of law. There are many examples of how morality and law might be said to overlap with respect to the content of law: 1) Law might incorporate principles of the rule of law or procedural justice which have moral status ; 2) Judges might resort to moral principles in the determination of hard cases, that is, cases for which no legal precedent exists and therefore inject moral content into law; 3) Law might invariably satisfy certain purposes or needs common or natural to humans and thus might be said to secure a rational or moral foundation; 4) Certain concepts like obligation or justification employed in law might be moral concepts.

All these points have been countered by writers in the legal positivist mold. For example, regarding the status of the rule of law Hart writes that such principles are compatible with great "iniquity" [48]. Lyons suggests that such principles could constitute no more than a "necessary condition" of justice. [49] Raz defines the rule of law narrowly and argues that the extent to which such principles are "essential to law is minimal...[and] essentially a negative value." [50]

Regarding judicial resort to moral principles in the determination of hard cases, Lyons argues that the determination of a necessary connection depends on what kind of theory of justification we adopt. If we adopt a theory of loose or weak justification, then judicial reasoning can always be seen as being guided by some *legal* principle. [51] Similarly, as we have seen, Raz suggests that if we widen the scope of the sources available to judges to include all interpretive materials, then they can always be seen to be applying legally authorized sources. [52] The point both authors seem to make is that judges need not be understood as ever being completely at a loss for *legal* guidelines as they work through their decisions.

The connection between natural needs like survival and law has been explained by Hart to be a necessary one but contingent on human nature retaining its various features of vulnerability. He writes that it is a "mere contingent fact which could be otherwise, that in general men do desire to live even at the cost of hideous misery." [53] In other words, the desire to live, like the problems of physical vulnerability, rough physical equality, and scarcity, are not "necessary truth[s]" about human nature or the environment and "might one day be otherwise." [54] As we saw above, Hart does recognize that these contingent facts place some limitations on "the positivist thesis that 'law may have *any* content' " [my emphasis] [55], but as I argue in Chapters Four and Six, I think this falls short of clearly establishing a necessary connection between law and morality or even between nature and law. For Hart, these considerations only suggest that "a place must be reserved [in legal theory] besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient features they have." [56]

Unfortunately, I think that the *non-moral* status of this admission is made very clear when Hart argues that these minimal conditions are satisfied when extended effectively to only a few who happen to control power. The moral down-side of the system of law described by Hart is that the "centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not." The *benefits* of a modern system of law include "the gains...of adaptability to change, certainty, and efficiency." [57] On the other hand, the potentially terrible *moral* costs of a modern system of law result because while legal systems must necessarily respond to some of the basic human needs, as Morawetz puts it, they "may respond by creating a very unjust system." [58]

Finally, many have noted the fact that law and morality share certain concepts or at least vocabularies. The question is of course do these concepts necessarily mean the same thing in these allegedly different contexts? According to Hart, legal and moral obligations are analogous concepts. This supports the contention I made at the outset that legal positivism has positivist pretensions. For this view implies that legal and moral obligations, when they do not require the same thing, indeed when they require opposite behaviors, might be *equally* justified in requiring conformity. There are, of course, many differences between these two kinds of obligations according to Hart [59], but the similarities between them account for their equality with respect to the question of justificatory strength. I do not think this implies that conflicts between legal and moral obligations can never be resolved. But I think this view invites unnecessary conflicts between such obligations, and involves very serious impracticalities and immoralities in the event that what law and morality require is at substantial variance.

Moral and legal systems are *both* species or "forms of social standard or rule." [60] As such, it seems that the particular rules constituting each system may be said to be accepted or established in the same way, that is they are generally obeyed and exhibit some diffusion of internal attitudes through the officials of a society. [61] As Lyons notes, "criticism of [social] behavior might be based on either law or morality ...[because] Hart conceives of obligation simply as a function of established rules". [62] In other words, Hart thinks that the conditions for the existence of legal and moral systems, their requirements, though perhaps not all our expectations of them are analogous. They are independent in the sense that they can require contraries and be equally justified in doing so. Law may say "war" and morality may say "peace", and from the outside, according to Hart, we must count these as justified so long as their decisions are wrought through the proper formal channels of acceptance, validity, and conformity or other appropriate justificatory apparatus.

It is important to see that there is a certain amount of disagreement amongst legal positivists on this subject. For example, it seems certain that Austin understood "Divine laws" or the "principle of Utility...[or] the rules which God has set to mankind" [63] to trump "positive laws" with respect to justificatory strength, even though he thought that structurally or logically all laws were the same in the sense of being "commands". Raz, on the other hand, argues quite clearly that sometimes users or asserters of legal and moral obligations might intend the same meaning or the "full normative force". [64] This might be understood as a function of the variable features of the internal point of view and coincidence or overlap between the content of moral and legal standards.

Even though legal positivists disagree about the nature of obligations, they generally agree that the criteria of validity establish *reasons* for applying and conforming to law, and therefore, specifically legal forms of *justification*. Systemic validity fixes particular laws as parts of systems of law. The fixedness or position of a law supplies a reason for applying or following it. As Raz says, "validity depends on the fact that [a law] belongs to a given legal system and that it is justified as such." [65] While discussing the concepts of acceptance and obligation in an early essay, Hart writes that references to the rudiments of validity provide "reasons for doing or having done what X says, as supporting demands that others should do what he says, and as rendering at least permissible the application of coercive repressive measures to persons who deviate from the standard." [66] In the Concept of Law, Hart describes the features of the internal point of view as including "[official] acknowledgements that [their] criticism and demands are justified". Later he says that satisfaction of the tests of validity constitute "part of the reason for [judicial] decision." [67] From the above, it is certain that legal positivists accept the idea that legal validity provides an independent form of justification.

So what does the separation thesis really mean? The answer to this question depends in good part on whether or not we choose to analyze matters at a high level of abstraction. Lyons does choose to operate at a high and general level of abstraction when examining the meaning of the separation thesis. Curiously, as a result he arrives at a conception of the separation thesis much different from what legal positivists have said it is. I think this is a little strange. Why? If we are interested in understanding , and even influencing what people think about legal positivism, I think we need to focus on what legal positivists say and how or if this affects legal practice.

The risk involved in pursuing analysis at the level that Lyons does is that soon we lose sight of *any* differences on this question between legal positivism and its rivals. For example, Lyons seems to argue that the social fact thesis does not require a version of the separation thesis or the idea that there is no necessary moral content in law. But this is only because he defines the former at rather ethereal and lofty heights. For Lyons, as for all, the social fact thesis requires that the identity of law depends on the identification of relevant social facts. Since there is an ethical theory called ethical naturalism which itself measures moral value on the basis of supposedly natural facts, and since there is not a "well confirmed" theory of relevant social sources, Lyons suggests that we cannot "show that law-determining facts do not insure that law has no positive moral value."[68] But this is not what any of the major proponents of legal positivism say. For as we have seen, Hart denies that natural needs suffice to inject moral content into the law and, Raz's strong social thesis undermines the injection of moral content into law even when moral principles are referred to.

In this thesis, I do not want to imply, as Lyons does, that we can speak sensibly of legal positivism as compatible with the idea that relevant or law-determining, social facts might necessarily incorporate moral content into law. For this would render legal positivism into a natural law theory. It seems to me that Raz's suggestions about the differences between legal positivism and natural law are much more plausible. While law cannot contain any moral content given the strong social thesis, it can at least be argued that this is not incompatible with some *weaker* senses of the separation thesis.[69] For example, we might say, as Raz has, that the social thesis necessarily constitutes a justificatory form, or that there is a necessary connection between law and "popular morality" in the sense that certain tenets relative to particular societies invariably get referred to and thereby influence law without becoming incorporated into the content of law. Now I will argue against both of these ideas later. But they seem to be much more practical and fruitful lines of argument than the one given by Lyons above. This is because they draw clear and distinct lines between legal positivism and natural law theory with respect to the two theses.

Relationship Between the Two Theses

It is striking how many analysts observe that the distinctions and claims of legal positivism not to mention natural law are ambiguous. No doubt there is some truth in this but I do not think it is cause for despair. From the discussion above about the nature of the social fact and separation theses, I think we can say that legal positivism stands on two clear claims: 1) the identification of law depends on relevant social facts and the logic of validity which are sufficient to justify its application and the form of justification involved is peculiarly legal; 2) there is no necessary connection between law and morality with respect to the relevant social facts of law which constitute its conditions of existence and so no necessary moral content in law.

With respect to the first claim, this rules out the adoption of ethical naturalism as part of the criteria for the determination of relevant social facts since this would upset the purely legal sense of justification gained from the claim in its present form and, in relation to the second claim, this would necessarily infuse law with moral content. Further, with respect to the second claim, it does not follow that there cannot be other senses of a necessary connection between law and morality. However these would be *weaker* senses than the claim that law necessarily has moral content. For example one might argue that law is justified on the basis of its order-achieving purpose. In other words, we might argue that *any* order was better than no order so long as this satisfied the conditions necessary for the existence of a modern system of law. Or one might argue that the established morality of particular societies always influences law. This is a weak claim because the nature of this influence is *relative* to the different and changing circumstances of particular societies, and in any case could not be said to necessarily inject moral content into law in order to remain consistent with the first claim. Or one might argue that there is a necessary connection between law and morality in the sense that external or moral criticism is recognized as legitimate. For example, this might be established as a condition necessary for the proper determination of hard cases. But again, resort to and choice of moral principles would be *regulated and limited* by recognized legal principles so as to disallow moral content in law.

Chapter Three

In the previous chapter we examined the main features of legal positivism. The social fact thesis and the separation thesis together suggest strongly that legal positivism is primarily a descriptive and explanatory effort by legal theorists to provide the criteria necessary to identify laws. These criteria are defined by the social fact thesis. Legal positivism supposes that the description or identification of law can be accomplished without any necessary resort to moral criteria, *and* that judicial use of the criteria of validity can suffice with respect to the question of the application of the law. The separation thesis can be an implication of the way in which the social fact thesis sets out the terms of the conditions of existence and legal validity. On the other hand, some sensible interpretations of the contrary of the separation thesis can be understood as independent of the social thesis.

At the same time, in addition to their descriptive focus, legal positivists have not been shy of moral and evaluative enterprises. The present chapter explores the nature of these attempts and their relationships to the social fact thesis in particular. I want to show that the social fact and separation theses do have practical implications for the moral concerns set out by legal positivists but that these relationships go unacknowledged by these theorists. It is the contention of this chapter that the descriptive and evaluative activities cannot be separated at the level of theory oriented toward practical concerns as they are in legal positivism. In the end, we will see that legal positivism adopts a curious stance with respect to moral criticism of the law. For it recognizes the legitimacy of such criticism, but the terms of the social fact thesis render moral criticism ineffective.

The Moral Concerns of Legal Positivists

It is well known that when Austin spoke of the "merit or demerit" of law, he had definite ideas about the appropriate measure or test this implied. The "principle of Utility" or the "Law of God" constituted this measure. In the introduction to The Province of Jurisprudence Determined, he says that he is "[d]eeply convinced of its truth and importance, and therefore earnestly intent on commending it to the minds of others." [1] Humans have certain faculties, for example, the ability to determine "probable effects of our actions [of a class] on the greatest happiness of all" and those necessary to "collect the tendencies of our actions". Observation of these tendencies in the aggregate shows movement toward the happiness of all "sentient creatures." [2] Now even though the law of God and even some rules of positive morality are related to positive laws "in the way of resemblance [not analogy]" since they are "commands" or "imperatives" and "emanate from a certain [determinate] source", and often "coincide" with each other, they cannot be counted as positive laws. For they are "not clothed with legal sanctions, nor do they oblige legally the person to whom they are set." [3] Any "coincidence" is a product of the fact that "the copy is the creature of the [human] sovereign." [4]

Even though Austin is very clear here about the strict role of the social fact thesis and its relation to the separation of law and morality, he is just as clear about the legitimacy of moral criticism. This is shown by his certain commitment to the principle of Utility and by his understanding of the proper, functional relationship between moral theory and law: "The science of ethics...affects to determine the test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation." [5] In other words, given Austin's assumptions about the tight linkage between theory and practice [6], and that "legislation" and "morals" fall under the head of the "science of ethics" [7], Austin thinks that there is no sense at all in saying that law may be good or evil unless one takes seriously the *associated* task of determining the nature of just such tests. I submit that serious task-taking with respect to moral tests and the genuiness of the claim that moral criticism of law is legitimate are importantly related. As we will see, this serious task-taking does not seem all that evident amongst many contemporary legal positivists. A complete legal theory must consider both the tasks of identification and moral evaluation of law. Neither task has much merit or practical point without the other.

Many of Hart's writings do exhibit obvious and strong moral concerns. Here, I will not consider his specific works on natural rights, liberty, various problems with the enforcement of morality, or abortion reform. Instead, I want to focus on his early exchanges with Lon Fuller regarding the relationship between law and morality. In it, Hart, like Austin, assumes the legitimacy of moral criticism of the law. Unlike Austin, he does not offer a concrete test of the moral merit of law.

Hart cautions us to "two dangers": "the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism". [8] Notably, Hart here describes the importance of morality's critical authority with respect to law. Law ought to come under moral criticism because it must not "supplant morality as a final test". In other words, it must not, as Radbruch describes, come to a point where the attitude that the "law is the law...render[s] the jurist as well as the people defenseless against laws." [9] The question we consider later concerns how *effective* moral criticism as a "final test" can be under the constraints of the social fact thesis.

For now we should see that Hart saw dangers or threats to law coming from anarchists or idealists and from reactionaries. The former "encourage the romantic optimism that all the values we cherish ultimately will fit into a single system". [10] The latter are able to "stifle criticism at its birth" presumably because the coercive force of the law is in their hands. [11] So, it seems logical to conclude that moral criticism must be guaranteed, but also itself bounded somehow. Does the legal positivist view of valid law and legal justification facilitate the logical conclusion? Allegedly, the separation thesis as rendered by Hart accomplishes this by asserting two competing but analogous types of authority and justification. On this subject Hart concludes that the "[Utilitarian] protest against the confusion of what is and what ought to be law has a moral as well as intellectual value". [12] But why or how Utilitarianism necessarily implies the social fact and separation theses is not explained.

Now, it seems obvious that legal positivism attempts to build upon the alleged intellectual or analytic value referred to above through the development of the social fact thesis. In particular, the concept of validity, strictly speaking *one* of the conditions of the existence of law, allows us to identify law and account for its legal justification and some normative aspects. But social sources cannot be moral sources and valid laws are not necessarily moral laws. Yet, in a certain sense, we see the conditions of existence and validity in particular called upon to help accomplish *moral* work in the theory. How does this occur? The criteria of validity indirectly facilitates concerns especially about the problem of reactionaries simply by *not* explicitly and generally disallowing officials from resorting to moral criteria in hard cases of law. Of course, this is a good thing in so far as it throws up some very minimal hurdles in the path of reactionaries in control of state power. But this theoretical allowance or *permission* , perhaps in combination with Hart's authoritative discussion and approval of the legitimacy of moral criticism based on the importance of avoiding the "two dangers", seem to be all that we get in terms of the practical facilitation of moral criticism in law. As we will see in the next chapter, a strong case can be made which concludes that even when judges take the permission open to them here, the moral evaluation they come to engage in is quasi-moral argument at best.

Some important consequences and considerations follow. First, the discussion above about how validity can be said to facilitate or not block moral criticism altogether shows some threads fraying away from the tight wrap of the neutrality around validity. But validity as a fundamental constituent of the social fact thesis is supposed to be a morally-neutral concept. It is supposed to show how laws can be identified unproblematically, not how laws which need reform *might* be modified by sources which cannot count essentially as morally-neutral social facts. This relationship between validity and moral criticism does not seem to affect the sense in which laws are identified according to legal positivists. But it does throw some different light on to the relationship between the social fact thesis and the separation thesis.

Second, there is another stronger connection between validity, the other conditions of the existence of law, and morality. Validity, and the other conditions of existence, no doubt produce a certain level of more or less sophisticated social, legal, or institutional order. Legal positivism must assume that this kind of order-achievement is a key function of the law. But *as* social purposes, functions, or objectives the values of order, predictability, and stability are not really well defended even though the moral tradeoffs involved are noted.[13] As we see in the coming chapters, there is considerable tension between the justification of achieving a formal sense of order through observation of rules internal to a system, and justification of the achievement of a substantive sense of order which probably conceives of the formal sense of order as a mere implication.

Third, with respect to the "two dangers", the separation and social fact theses together seem very effective against the problem of anarchistic-idealists, but very ineffective against the problem of reactionaries who have control of powers of the state. Reactionaries often come from the inside, and therefore, likely will have certain advantages of power not available to their competitors outside of the existing institutions of power. In other words, the allegedly morally-neutral social fact thesis more *directly* facilitates the status quo, while only *permitting* its reform where moral principles happen to be contingently available for judicial use. This suggests another hidden moral implication. Does legal positivism think that reactionaries are less dangerous than anarchists or idealists? The last two points above involve questions about the moral justification of law.

In some of Raz's writings he, like Hart and Austin, assumes the legitimacy of moral criticism of the law, but unlike them, the grounds of this conclusion seem very insubstantial. Even though Raz discusses many relationships between law and morality, the reasons why such relationships are important are often left unsaid, or otherwise weakly argued. For example, in the introduction to Practical Reason and Norms , he observes that analysis and understanding of normative concepts and actions "presupposes some value theory" but need not be concerned with questions of "ultimate values" and the fiercest epistemological questions. [14] Well fair enough. Still, we can all see the problems associated with epistemological and ethical equivalents of a free-floating currency system given its instability and attractiveness to hungry sharks. I think that my own exposition and understanding of natural law theory does not require or force stands on "ultimate" value either. The reasons for this are stated in the concluding chapters. But the presence of a certain range of philosophical wilderness does not justify the near absence of substantial discussion of the more cultivated areas of epistemology and morality, or a relative focus on rather surreal subjects. In any case, Raz offers little interesting or concerted discussion of the relevant constituents of "value theory".

Some of the concerns Raz discusses in his analysis of law seem moral. For example, there is no dispute regarding the need for *justification* of law. Raz argues that the requirement of sacrifice normally attached to legal obligations itself justifies justification. We believe that calls for the sacrifice of our interests must be justified. Raz does not say whether it is important to satisfy this justificatory need because we believe that it is or because it objectively is so. Nonetheless, this seems to betray a certain brand of ethics, one that must take interests seriously, or view them as often legitimate. Most importantly though, doesn't this concern about the sacrifice of interests imply that a moral attribute is a necessary condition for the existence of a legal obligation?

One form of justification is internal to the system of valid law. The basis of this justification is, as we have seen, the existence of secondary legal rules. Raz adds that: "The law's claim to legitimate authority is not merely a claim that legal rules are reasons. It includes the claim that they are exclusionary reasons for disregarding reasons for non-conformity." [15] If however, according to the argument just above, the conditions of validity and existence of law include moral attributes, how can internal or systemic justification alone suffice as a warrant for legal obligations?

Regarding the sense of internal justification, Raz suggests that officials cannot adopt just *any* attitudes and actions with respect to the law. This is perhaps strangely put forward as true even though Raz writes that internal justification is unaffected by the possibility that judges might be motivated by self-interest or even fully-reject the system of law they enforce. [16] Clearly, from the standpoint of stability or effectiveness, if judges' motivations do not matter their deeds must. This must be the reason why some of them anyway must be required to "pretend" that they believe in the internal justification of the law. But Raz does not let it stop here. For he says that "some people *must* believe that laws are valid reasons for laws to exist." [my emphasis] [17]

Now the object of official belief in the passages cited above is ambiguous. On the one hand, a judge must "pretend that he fully endorses" the "rule of recognition" [18], on the other hand, judges must "act on the belief that laws are valid reasons for action" [19], on still another hand, officials must believe or "avow such a belief" in the "legitimate" as opposed to "effective" authority of those claiming the power to govern. [20] From this, it is hard to see if we are concerned with belief or pretension of belief in moral objects, a plausible interpretation given Raz's discussion of legitimacy and understanding of the content of many "rules of recognition", or in non-moral, social facts. The tension is irrelevant to my present the present argument. For even though we may here only be concerned with legal reasons, Raz seems to insist on *fidelity* to them. But why? Again, doesn't this imply that another moral attribute stands in as a condition for the existence of law?

At a different or external level of justification, Raz begins to face the justification of the order-achieving function or purpose noted above. He writes that sometimes it "may be better to cause hardship in a few cases than to lead to great uncertainty in many." [21] There is no doubt that systems of valid law necessarily produce distinct structures of social order and so this observation might be seen as a mere description of the function of law. [22] In any case, Raz like others, does consider here the possibilities for the "moral authority" of the law, even if some find it strange to attach philosophical or argumentative *weight* to uncertainty, as Socrates is said to have noted in a rather vital context. But as soon as we entertain ideas about the purposes or functions of law, even if they only concern the achievement some level of certainty and order commensurate with the observation of the criteria of validity and the enforcement of associated sanctions, we beg deeper questions about the justification of law.

Analysis of Sartorious' views reveals some of the same kinds of problems seen above. Regarding external justification, Sartorious does defend a view of the moral authority of law, thus exemplifying Austin's dictum that the law has "moral merit", and the legitimacy of moral criticism. [23] At the same time, he too, is comfortable with leaving the effectiveness of moral criticism to fend for itself against the apparent indifference of the social fact thesis.

Leaving aside, for now, the question of the relationship between the underlying bias of the moral interests of any status quo and the alleged neutrality of social facts, Sartorious, like Raz above, seems to slip up in his discussion of the morally-neutral status of the social sources of law. He suggests that it might be important in terms of understanding the conditions of the existence of law to take account of a certain aspect of the relationship between citizens or subjects and the law. Hart, of course, denies any relevance or substance to this relationship for the purposes of identifying and justifying the law. Sartorious observes that: "Mindless passive obedience is not the norm for the simple reason that most people tend to question just what is going on when they are met with the persistent threat of coercive force...[attaching to various claims] of both moral and legal right." [24] According to Sartorious, this justifies making the claim that "the ordinary citizen believes that there exists a set of constitutional rules, accepted by officials, which determines what 'the law' is which he is required to obey." [25] Sartorious does not explicitly argue that this claim ought now to be required as a necessary condition for the existence of law.

But what of importance is being recognized here? What needs to be recognized by legal theory and why? Is it the presence of an unaccounted for "norm"? If so, must the norm be accounted for because we must account for all relevant norms, or because some of them involve moral beliefs or underlying objective values? What if "mindless passive obedience" *was* the norm? Would it then be acceptable as a behavior consistent with the concept of law? In any case, his consideration of the matter weakens the claims made for the social fact thesis since it seems obvious that there is a sense in which most citizens or subjects evaluate the law from a moral position and that this likely influences the determination of law. The existence of law presupposes the existence of moral and practical interests. Again, moral attributes and facts help to account for the existence of laws, not just the fact that certain rules of validity are followed and that general conformity can be observed. Why follow the rules of validity in the first place? Why pretend that sufficient justification of law follows simply from the official observation of such rules?

Legal Positivist Resolutions of the Problem of Justification

Legal positivists generally allow for the legitimacy of the moral criticism of law, some, like Austin, wholeheartedly support it by unabashedly dealing in the moral discourse itself. Others, like Raz and Sartorious, recognize a need for moral criticism but the basis for this need is left very unclear in their legal philosophic writings. Some other writers in the legal positivist fold, like Postema and MacCormick, recognize the seriousness of this dilemma for the soundness of legal positivism as a sensible and practical theory of law and deal squarely, though not adequately, with the tension between legal and moral justification. All of this *legal positivist* attention to the problem suggests the relevance of moral criticism to legal theory. It is, however, my contention that the dilemma cannot be resolved acceptably while retaining a commitment to the independence of the criteria of validity with respect to legal justification. In this section, I consider some of the relevant work of Postema and MacCormick.

In his essay, "The Normativity of Law", Gerald Postema sets out to resolve the tension in the philosophy of law between the view that "law is essentially practical" and the view that "law is essentially a social phenomenon".[26] This tension involves conflicting claims about the nature of the environment law is found in, and thereby draws its distinctiveness from. If law is essentially practical then its distinctiveness derives from its decision and action guiding and proposing functions not as much from the way in which judges identify law through the use of the criteria of validity. This suggests that some account of the rationality and morality of agents and their purposes is in order. For rational agents would use legal standards in connection with the purposes and aims they and their societies try to achieve. Now some legal positivists would argue that the identification of any substantial rational or moral purposes is severely limited by the complexity, diversity, or relativity of the moral views of societies. Because of this, law is best understood in the terms of the social fact thesis whereby it is identified through morally-neutral social institutions and practices. Still, Postema suggests that the appropriateness of the legal positivist program comes to be "limited by the shape imposed on [law] by this primary practical environment."[27] But how so? Are these limitations applicable to the way in which laws come to be identified, applied, followed, or justified?

After criticizing both of these positions, Postema comes to a resolution or a "marriage of the surviving portions of each account". [28] Now, I think his account is flawed. Most importantly I think, he misrepresents Hart's position. For in the end, most of the advancements he claims to make against Hart can already be inferred from Hart's existing theory. Further, Postema continues the legal positivist focus on describing or accounting for behaviors, especially the behavior of judges and officials which allegedly accounts for the normativity of the law, or the reasons why and the ways in which it is used as a standard or a set of standards. In doing this, he focuses exclusively on what officials allegedly do. This suggests that a closer examination of the terms and stakes of the debate about the determination of law between natural law theory and legal positivism is in order. But first, we must look more carefully at Postema's critique.

Postema criticizes two main aspects of Hart's theory alleging that both constitute evidence for holding the social fact and separation theses according to Hart. First, Postema addresses the idea that "committed judgements of legal obligation do not entail corresponding committed moral judgements."[29] Second, he interprets Hart as saying that the motivations behind the adoption of internal attitudes are "entirely irrelevant".[30] Postema sensibly denies that the legal and moral commitments of officials can be disassociated from each other if we are to gain an adequate understanding of the normativity of law.

Before examining these ideas in connection with Postema's resolution, I want to note that he makes some strong points against Hart concerning the nature of legal obligation, though in the end I do not think these are acceptable either. Whereas Hart severs the relationship between the existence of particular legal obligations and any reasons why particular subjects should conform to them, Postema at first seems to preserve the sufficiency of the social fact thesis with respect to the identification of valid *rules*, but narrows legal positivism's claims somewhat with respect to the relationship between the social fact thesis and particular legal *obligations*. This, of course, implies that it makes sense to identify legal rules apart from legal obligations for the purpose of remaining true to the social fact thesis. He writes that: "The more natural place to introduce the break is between the existence of the formally valid rule of law and the existence of [a legal] obligation to comply." [31] So rather than taking Hart's view that the existence of a valid law implies the existence of a legal obligation but no reasons for subjects for why it should be obeyed, Postema is suggesting that it makes sense to say that the criteria of validity identify legal rules as distinct from legal obligations. If we do this, however, the social fact thesis no longer retains much of a relationship with normativity and justification and so begs the question of its function in legal positivist theory.

Postema suggests that officials must ensure that laws make "rational claim[s]" upon citizens or subjects. [32] Such claims of legitimate authority will be ensured if laws address "public general rules" and if officials make efforts to understand "the point of view of law-subjects." [33] Postema qualifies these requirements when he says that the absence of a rational claim "cannot be a permanent or pervasive feature of a legal system." [34] I think there are three problems with this part of Postema's argument: 1) The rational requirements put forward by Postema are satisfied by Hart's theory. 2) In the cases of Hart and Postema, the rational features are general, formalistic, and therefore, vague. 3) Postema never says how to define "permanent or pervasive feature", and so is open to the charge that he accepts everything Hart says about the social fact thesis, except under some unspecified and probably rare conditions. I will only discuss the first point above since the last two do not seem controversial.

Are Hart's officials committed to "public, general rules" ? What should be the measure of moral commitment here? I would suggest two ideas. The only improper motivation for official acceptance is fear and officials must "appraise critically their own" behavior. [35] Clearly such judges will be bright enough, as we are, to see that their appraisal of their own actions implies *generality* . Indeed, for Hart, generality is only a defining characteristic of the concept of a rule. Rules are general standards applied to particular cases. These same rules are *public* in the sense that they are known or accessible to the *whole* of society. Finally, the fact that officials are not coerced into appraising their own behavior according to general rules suggests the possibility of making some kind of commitment to them, or more accurately, to using them. If sacrifice is involved in the bringing of one's own behavior under general rules, and the mere fact that officials clearly limit their own liberty though perhaps never substantially over the life span of the rule points to some degree of sacrifice, then it seems as if officials under Hart's own terms can be understood as committing themselves to actions that involve morally-relevant characteristics and consequences. Though Hart does not identify this implication it seems to satisfy Postema's apparent and rather ambiguous requirement of moral commitment.

Do Hart's officials make efforts to understand the point of view of non-officials? Can Hart's officials be said to take account of "the role the rules can be expected to play in the practical reasoning of law-subjects." [36] If Hart is right about the implications of "what is in fact involved in any method of social control...which consists primarily of general standards" [37], then clearly officials must be understood as making at least minimal efforts here too. For Hart, some basic rule of law criteria are implied by the idea of a general rule since such rules must provide the "opportunity to obey". [38] In so far as Hart's officials encourage impartiality, promulgation, possibility, intelligibility, and prospectiveness in law, it seems as if important, though not exhaustive or even the most important, aspects of practical reasoning are being accounted for by them.

Now in what sense are the motivations of Hart's officials entirely irrelevant? As I noted above, the only improper motivation for accepting law in the sense of the legal or internal point of view is fear. Hart writes that "some at least must voluntarily co-operate in the system and accept its rules." [39] So it is obvious that motivations are not entirely irrelevant, even if, as Postema acknowledges, Hart believes that "it is no part of the legal point of view that this acceptance rests on a conviction of the moral legitimacy of general compliance with the rule of recognition." [40]

We already know that Hart defines the notion of official acceptance or the internal point of view simply in terms of the use of standards which are understood to be justified solely on the basis of their connection to the criteria of validity. The internal point of view though does entail thinking of one's own "conforming behavior as 'right', 'correct', or 'obligatory'", or we might say as legally justified. [41] We know that acceptance, especially with respect to the most basic rules of recognition, is "unified or shared" and cannot be regarded "as something which each judge merely obeys for his part only." [42] We see from the above discussion of Hart that he can be seen already to incorporate most of the alleged advancements identified by Postema. At the same time, as we will see below, Hart seems unwilling to reconsider the relationship between social fact thesis and normativity, justification, and morality. So while the relationship between officials and subjects Hart considers seems to meet most of Postema's concerns, as far as we can tell what they are, the relationship remains far from appropriate from the standpoint of natural law theory.

"Constructive conventionalism" is Postema's contribution to the legal-philosophic impasse we defined at the start. On this view, "officials recognize...that their joint acceptance of the criteria of validity must be linked to more general moral-political concerns...[and] they also realize that an essential part of the case to be made for the criteria rests on the fact that they jointly accept the criteria.".[43] It is clear that Hart's notion of acceptance satisfies the latter condition. That Postema doubts even this by suggesting that Hart's claim *might* be interpreted as a "simple convergence thesis" is perplexing. He suggests that Hart's officials need not show *any* agreement "in the reasons they give for accepting [the criteria of validity]." [44] But everything I have argued shows that officials share at least an understanding of authoritative reasons. Officials may have many reasons or sets of reasons for accepting the criteria of validity as Hart points out. But one common and commonly available reason will likely be because they *are* accepted. I think that Postema is right that Hart does not rest the internal point of view on judgements of the moral justification of law. As I will argue, this is not acceptable for practical and moral reasons. At the same time, we have seen that Hart's officials can be said to be committed to "general, public rules". So why can't they also be said to have "general moral-political concerns"?

Until Postema defines his terms better, we cannot even say if he is committed to attaching judgements about moral legitimacy to the conditions of existence either. Interestingly, no less a strong legal positivist as Sartorious himself notes that Postema's argument "is so very carefully qualified that I am not sure if I really disagree with it." [45] There are many difficulties posed by the severity of his qualifications and the vagueness of his terms: 1) What is the relationship between having a "general moral-political concern" and basing one's legal decisions on evaluations of the moral legitimacy of the law? 2) What is the relationship between the two conditions of "constructive conventionalism", and most importantly of all, how do they relate to the question of justification? 3) Can "general moral-political concerns" and evaluations of moral legitimacy be dispensed with in the same way that commitments to "public, general rules" and attention to the point of view of subjects can be so long as these do not constitute "permanent or pervasive" irrationalities? 4) Why is it that only the attitudes of officials matter in terms of accounting for the normativity of law and why should we not consider the capacities of citizen-subjects too?

One reason why Postema and, as we will shortly see, MacCormick approach Hart the way they do is that they tend to take Hart's recent statement of the nature of legal obligation in his Essays on Bentham as saying something much different from what he says in the Concept of Law. I am not sure if this is accurate. In any case, what Hart says in some of the essays in the former work allows Postema to focus on the questions about the nature of judicial commitment and the internal point of view in the ways that he does. MacCormick too seems to take statements in the Essays as the authoritative and distinctive Hartian view of judicial commitment. The truth is, though, that upon further analysis we can find the view stated in the Essays quite clearly stated in Concept, albeit along with a different one. I do not interpret this as dispensing with any particular line of argument.

MacCormick notes that there are two views of legal norms: 1) They might be understood as "primarily norms of official conduct"; 2) They might be understood as "statement[s] of reasons the judge supposes there to be for the citizen to do something ". [46] MacCormick chooses to focus on Hart's statements in the more recent Essays which discuss legal norms and obligations in the terms of the first view. Well Hart knows about these differences, and I think allows secondary rules to have both functions.

While secondary rules like primary rules must be treated by judges as "essentially common or public" standards, there is also a strong sense in which secondary rules must be regarded as "common standards of official behavior", or as MacCormick says, as "primarily norms of official conduct" albeit not exclusively so since *judicial* use of them constitutes a distinct sort of norm. [47] When secondary rules are treated this way, they provide judges with "authoritative legal reason[s]" as Hart says in the Essays, or with "authoritative criteria *for identifying primary rules* of obligation" [my emphasis] as he says in the Concept. [48] On the other hand, , in the latter book, Hart writes that secondary rules provide "both private persons and officials" with such criteria. [49] In other words, the use of the criteria of validity by an official can count as a reason why a judge identifies a law, or for why he applies it and so for why he thinks a citizen must do something, or *might* count as a reason for a citizen for conforming to it supposing that the citizen was in the business of taking the validity of rules as a justificatory reason in the first place. I do not see anything in the two essays considered by MacCormick which suggests a pronounced change of view concerning the types of reasons made available through observation of the terms of validity. [50] Again, as we have noted, Hart's condition of "general conformity" implies that citizens are not or at least *need* not be engaged in such business in order for the law to be said to exist.

The problem MacCormick has with Hart's views on the issues above concerns the nature of obligation generally, and the relationship between legal and moral obligations in particular. He writes, I think accurately, that Hart's present thesis is that a judge's identification of a legal rule or obligation *means* or refers to the idea that some person[s] have a duty which can be properly demanded of them given its validity, not to the idea that the action demanded *necessarily* provides citizens with reasons to conform. [51] I think this has always been Hart's view. Is it correct? Does MacCormick improve upon it in any case? I will argue later that I think this view of obligation is difficult because it improperly severs what judges and citizens respectively do. I do not think that MacCormick's reformulations get us through the problem either.

First, let us be certain about what Hart actually says. He writes that judicial statements of obligation "do not refer to actions which [citizens] have a *categorical* reason to do." [my emphasis] [52] Surely Hart is right about this. Citizens may have many competing reasons for conforming or not conforming to the law. On the other hand, in law a citizen is confronted with a force which cannot be avoided. It makes absolute demands on citizens over discrete areas of activity. We can refer to this characteristic as the "peremptoriness" of law. On the other hand, the presence of a valid and applicable legal rule confronts a judge in a different way. Hart would have us believe that this relationship is accounted for through the ideas of "acceptance" of secondary rules or the internal point of view. I think we need an understanding of role-responsibility here. But this is one of the subjects of chapters to come. The question MacCormick and Postema consider concerns the kinds of demands made upon officials and the sorts of associated commitments or attitudes involved. Both argue correctly that Hart's account of the internal point of view is inadequate . In the end, both argue that judicial statements of legal obligation require an internal view more substantial than that provided by Hart because of the categorical or peremptory pressures of law.

But MacCormick's analysis of the relationship between the peremptoriness, validity, and the justification of law is difficult. Peremptoriness sets up the need for justification, but the latter gets described in terms of "pretension" echoing Raz.[53] He writes that the "judicial pretension to justification in administering the law...amounts to a pretension to having some justifying reason [as opposed to a motivating reason] for one's judicial commitment."[54] There are major problems with this formulation all of which surface because of the failure to face squarely the obvious tension here between description and evaluation : 1) Are we suggesting that all a judge need do is make a *claim* that her decision is justified. As such, it moves not away from Hart. MacCormick needs to, but does not, specify the terms of his "moral" and "content-independent" reasons.[55] 2) Since the claim of justification may be pretended, does this imply the possible acceptability of judicial deceit as a feature of justification? 3) It seems that MacCormick does not give an "account of the nature of moral justification" as he imagines [56], so much as an account of the *manner* in which alleged statements or claims of moral justification might be made.

In this section we have seen that Hart and Austin have clear and sometimes well developed moral concerns, but steadfastly refuse to compromise the social fact thesis. Unfortunately, given the strength of the form of legal justification which results from the social fact thesis, especially the logic of its authoritative and coercive nature, we must doubt the seriousness or at least the effectiveness of these author's approaches to the legitimacy of moral criticism. My view is that some theoretic requirement covering the need for moral criticism in relation to law must be built into legal theory. Raz, Sartorious, Postema, and MacCormick all exhibit moral reservations and concerns, and the latter two take some awkward steps toward resolving some of these problems *within* the theory of law. But these considerations and steps are vague and sometimes confused. The main problem with the efforts of Postema and MacCormick is that neither one sets out the precise implications of their perspectives for the relationship between justification and the social fact thesis. To what extent, if any, do their reformulations of the internal point of view affect the authoritative capacity of a judge to identify *and* , more importantly, to apply the law? More generally, none of authors listed just above answers clearly, as Hart does with his discussion of the "two dangers", the question: What is it about law that necessitates the view that moral criticism of it is necessary and legitimate? And unlike Austin, no one solidly answers the question: What is the appropriate moral point of view? Because of the problems summarized here, I think legal positivists are much better off remaining true to Hart on all accounts. For arguably, Hart's staunchness begs fewer questions about the relationship between law and morality generally.

Legal and Moral Obligations

In this section, I examine in greater detail legal positivists' views on the nature of the relationship between legal and moral obligations. This is important to do here for a number of reasons. As we have seen, aside from Austin's clear identification of what he considered appropriate moral standards, and Hart's discussion of the "two dangers", other legal positivists have registered moral concerns. These may be summarized as: 1) concerns about the nature of the internal point of view of officials; 2) concern about the relationship between legal and moral obligations. These ideas are not unrelated since the social fact thesis as I have explained it involves ideas about official acceptance or the internal point of view, and understands judges as identifiers of legal rules and obligations.

All legal positivists accept the social fact thesis in the sense that they understand the identification of law to be a matter of non-moral social fact. But if judicial statements of legal obligation mean more than what Hart imagines, then other legal positivist claims about the function of the social fact thesis seem to weaken. The social fact thesis is supposed to supply judges with sufficient reasons for applying the laws they identify through the criteria of validity. But if legal obligations imply that citizen-subjects need or want justificatory reasons for their conformity to particular laws, we must question the appropriateness of authoritative legal reasons in this regard, and the legal positivist understanding of the internal point of view and judicial responsibility generally. I think this discussion points the way to the need for a concept of the *integrity of law* , involving a wider view of the relationship between officials and subjects and moral justification.

Hart consistently, over thirty years, has argued that legal and moral obligations do not mean the same thing. [57] I will focus primarily on what he says about this in the Concept and in the Essays. There are similarities and differences between these kinds of obligations according to Hart, but the similarities are most important in terms of establishing their logical independence. We will however also survey and criticize the alleged differences so that we can get a full understanding of Hart's argument.

Hart points to four differences between legal and moral obligations. [58] Each of these differences derives from "the vague sense that the difference between law and morals is connected with a contrast between the 'internality' of the one and the 'externality' of the other". First, Hart argues that moral rules or obligations differ from legal rules or obligations according to the "great importance" attached to "any" of the former, but only to "some" of the latter. Following Hume, I suspect, Hart sees importance to be a function of passion. But, if some moral systems are complex, rule-based structures, some of the rules may be of little importance in relation to other rules of greater importance in the system. Likewise, if importance is defined in terms of the level of passion, clearly laws are important in just this sense . For criticism and punishment attached to non-compliance with laws arouses passions too.

But the sense of importance described just above seems to be attributed to law from the outside. In other words, Hart seems to suggest that subjects might consider some laws more important than others. No doubt this is true. But there is a sense in which insiders or officials cannot differentiate between laws on the basis of importance. Officials involved in the identification, application, and enforcement of valid laws must consider, or act as if they consider, that all valid laws are equally important in the sense that they *must* be applied when the actions they identify as illegal are committed. This is a function of the justificatory logic of validity. Officials have no choice but to apply valid laws. On the other hand, judges may use some discretion in sentencing.

Second, Hart points out that moral rules cannot be changed by deliberate repeal or legislative enactment. Moral rules arise from and change due to "slow, involuntary processes [and] practices". Of course, there should not be any purely moral legislatures given Hart's first "danger" discussed above, and the point about law is accurate enough. However, in practice, laws and legal systems could not retain their status as law if legislatures got into the habit of briskly and repeatedly changing laws even though they might have the authority to do so. Indeed this would violate important principles of the rule of law.

Third, Hart argues that legal obligation can be distinguished from moral obligation on the basis of the importance each attaches to the voluntary commission of acts or to intentions. Hart suggests that moral theory generally understands involuntary commission as a justification, therefore, as an immunization against responsibility, blame, and punishment. Again, there is a point here. Moral theories are certainly more likely to take intention more seriously and in a different way than law. But legal systems recognize the importance of intentions too. However, they tend to employ the *absence* of them as excuses not justifications. Excuses admit of wrongdoing, whereas justifications deny it. But the ground between these ideas is narrower than Hart allows. For both excuses and justifications are submitted, or proposed as *reasons* , not simply vaguely asserted. Both are recognized as legitimate constituents of legal argument, defense, and criticism. In other words, there are some attributes of a larger sense of justification that Hart ignores here.

Finally, Hart suggests that moral rules cannot be supported *only* by "threats of physical punishment or unpleasant consequences, whereas laws, apparently *might* be. Moral rules are supported more by regular appeals to conscience, arguments about the importance of character, or the respect due to moral agents or to the rules themselves. I think there are especially difficult problems with Hart's argument here: 1) Hart elsewhere argues that sanctions do not establish legal obligations. Now we see by implication that they alone might support them. But if law might be supported only by threats, what is the difference between law and force? 2) What exactly does Hart mean by *supporting* legal rules with sanctions? Do threats of the hangman's noose ground, maintain, or shore-up legal obligations? But if the criteria of validity establish legal obligations, doesn't *continued* official acceptance of rules rather than punishment alone support the already established obligations? Don't the *practices* Hart introduces in the Essays, which contextualize, albeit vaguely, the maintenance of general acceptance, support the obligations?.

The point here is that Hart implies that a legal system might be supported by threats alone, but this begs the question about the relative importance of official acceptance or the internal point of view and judicial practices. Further, it implies that the question of justification looms large especially in relation to legal sanction and punishment. But the only kind of justification offered by legal positivism is that internal sense deriving from observance of the criteria of validity, that is, justification follows because a consistent body of rules is accepted by officials. No reference to content is necessary. This form of justification (or justification in terms of form) allegedly justifies judicial determination of the law and its application, that is, its use as a legal obligation. But is it plausible to suggest that this same form of justification is sufficient or even relevant with respect to the justification of sentencing decisions requiring capital punishment or life imprisonment? Can judges sensibly take the validity of a law as a justification for sentencing? Isn't sentencing part of applying the law or, in any case, an inseparable consequence of it?

As we saw above, what makes legal and moral obligations the same but different, according to Hart, is the idea that they are "species" of rule-based systems. So long as the general features constituting such systems exist, the obligations produced by them are *internal* to the system and *independent*. The general features of rule-based systems are set out in the Concept.[59] Rule-based systems include: 1) general use of standards; 2) recognition of the *existence* of standards as justifications for criticism of deviations from it; 3) acceptance of standards as things to be obeyed by all.[60]

Moral systems and legal systems then contain rules, or obligations, or demands for compliance, or assertions of actions required or owed, regardless of whether or not the individuals who have the obligations consent to them. Such demands are insistent in the sense that they are backed by sanctions and official, institutional, and social pressures. Both ideas above seem to be required as practical matters and therefore may be understood as duties.[61] So to say that someone has an obligation is to identify the circumstance of falling under a general rule as binding, required, or peremptory, and so as implying a sacrifice is necessary.[62]

Suppose a particular law L_x is required in situation S_L of any individual *i*:

if, L_x is required in S_L
and, i_3 is in S_L
then, i_3 must L_x

Now suppose moral rule M_y is required in situation S_M of any individual *i*:

if, M_y is required in S_M
and, i_3 is in S_M
then, i_3 must M_y

Analysis of these normative situations can provide us with a sharper understanding of Hart's position and the positions of some of his critics. Now the way we interpret the meaning of a normative statement might depend on many factors including: 1) who or what says it; 2) who is subject to it; 3) the justificatory or epistemological basis of the rule. The controversy between Hart, Raz, and MacCormick results from the different ways these theorists address the points above. For the purposes of understanding the meaning of legal obligations like *Lx*, Hart tends to understand these as:1) posited by authoritative legal institutions; 2) something available to judges or other officials which can be applied to others; 3) most importantly connected to secondary rules. Raz seems to understand legal obligations as: 1) posited by authoritative legal institutions; 2) intended as a directive to subjects *in general* ; 3) part of a particular legal system *and* part of a larger set of justificatory reasons which either exists or is believed to exist and contains or is believed to contain rules such as *My*. [63] Finally, MacCormick suggests that we should understand legal obligations as 1) posited by or "jurisdictionally relative to" authoritative legal institutions [64]; 2) intended for subjects *in general* ; 3) part of a particular legal system *and* the larger class of actions "properly demanded of us" which also contain rules like *My*. [65]

Legal obligation and moral obligation mean roughly the same thing for Raz and MacCormick because they constitute parts of larger justificatory systems which include citizen-subjects or agents who themselves require justificatory reasons when confronted by obligations. Hart would argue against Raz and MacCormick by saying that their formulations decontextualize rules from their immediate bases, that is, from their ontological and logical relationships with their systemic brethren. Rule systems exist independently, one from another. Hart writes, in the Essays, that the rival view of obligation considered above "conveys an unrealistic picture of the way in which the judges *envisage* their task of identifying and applying the law, and it also rests, I think on a mistaken cognitive account of normative propositions of law." [my emphasis] [66]

Perhaps Hart thinks that there is happy and comfortable coincidence between the way judges *do* act given their "settled practice" and "settled disposition", and the way they *should* act given the assumed truth of Hart's "non-cognitive theory of duty." In any case, the latter is non-cognitive because it ties the meaning of legal obligations to the *conventional* practice of judges and officials, that is, to the fact of acceptance or the internal point of view, or as Hart says in the Essays to "settled practices" and "settled dispositions". This meaning comes from the idea that rules bind, or can be properly demanded, on the basis of their systemic relationships with other rules and acceptance of the more basic secondary rules, not from rules understood as including justificatory reasons to perform one's legal obligations.

But this draws us back to the questions we considered earlier about the acceptability or justifiability of legal positivism as a social science. For here Hart seems to conflate ordinary language and descriptive justifications with evaluative argument. After all, Hart does say that judges "envisage" their role or tasks in a certain way. But do judges come off the presses programmed to think a certain way about their responsibilities? In any case, who is looking after the presses? Judges *need* to act a certain way according to Hart. This implies that they could act in other ways including ways which might contradict the way they need to act. Therefore, Hart holds a view which says minimally, that judges should not act in some ways. In other words, Hart has a picture of how judges *ought* to act. But this picture is presented as a description of the way in which judges do act, not as an evaluation let alone a prescription.

According to Hart when officials say " $i3$ must L_x" they do not refer to actions required by non-systemic justificatory reasons. Therefore, they need not be committed to any such reasons either. So Raz's rather vague account of objective reasons, or a more substantive, natural law perspective on justifying reasons are irrelevant to what judges do and evidently ought to do. Against MacCormick, Hart agrees that judges are referring "to actions which are due from or owed by the subjects" [67] , but he might say that this does not imply the same meaning between *Lx* and *My* because it is the particular and independent set of authoritative sources which produces the *relevant* practical or normative consequences, and so the essential meaning of the obligation. But what are the relevant consequences here? For Hart, these must be confined to a judge's identification, application, and effective, therefore, potentially coercive enforcement. But this is a one-sided view of normativity at best. Indeed, it may not be an account of normativity at all if *general* recognition or acceptance of rules as appropriate standards is a necessary feature of a normative system.

We see that the meaning of legal and moral obligations changes as we shift our view from one set of relevant actors to another and so from one justificatory reference point to another. Raz and MacCormick arrive at different understandings of the meaning of obligations than Hart because they evaluate the implications of a *wider* sets of relevant actors with more varied or complex expectations, responsibilities, and decisional practices. These observations invite consideration of the features of the *integrity of law* especially: 1) the nature of justification; 2) the relationship between officials and subjects. Hart stays very close to the uncontroversial core of legal positivism and allows it to structure the separation thesis by disallowing any relevant shared meaning between legal and moral obligations. Raz and MacCormick accept the social fact thesis while recognizing the importance of moral criticism with respect to the question of obligations. But their position begs the question of the justificatory sufficiency of the criteria of validity, the points or purposes of moral criticism of law, and the strength of their commitments to both.

In any case, the discussion of this section shows that legal positivism's various accounts of the normativity of law are one-sided or incomplete since they assume that the decisions and actions of judges may be separated from those of citizen-subjects with respect to the question of the justification of the law. This is a consequence of accepting the social fact thesis. Second, the discussion shows that the concept of role-responsibility of judges is presupposed by Hart and others, but evidently not up for serious debate. These points, especially the first, suggest an obvious place for the moral criticism of law. In the next section I review the logical relationship between moral criticism and the social fact thesis paying attention to practical implications.

The Effectiveness of Moral Criticism

In describing his "strong social thesis" or "sources thesis", we saw that Raz thinks that "the morality to which [valid laws refer] is not thereby incorporated into law". The justificatory strength of the criteria of validity which stands behind the identification and application every legal rule can be understood as fully self-sufficient and independent of morality, according to legal positivism. Further, according to Raz, a social source allows for the identification of a law "without using moral arguments (but allowing for arguments about peoples' moral views)". Finally, social sources include "'interpretive sources', namely, all the relevant interpretive materials".[68]

Now I really think this passage of Raz's is composed of bald assertion, stipulation, and other difficulties. Why should *all* interpretive materials be considered as falling under the purview of legality? Aren't arguments *about* other peoples' moral positions most likely going to boil down to moral arguments themselves? What are we arguing in law *about* others' moral positions which justifies stipulating that such argument qualifies as peculiarly legal and value-neutral?

In the Essays, while discussing the possibility that judges might resort to moral principles in hard cases, Hart writes that such a practice can be understood as something "the existing law can be regarded as *instantiating* " [my emphasis] [69] From this passage, it seems plausible to suggest that Hart thinks that moral principles could not be considered by judges unless a valid referential rule validated the occasion for this to occur. Given this, there seems to be some ground for thinking that Hart goes along with Raz on the idea that social sources *fully* determine the content of law. But this contradicts the view we considered before that Hart accepts that through direct, unmediated judicial resort to moral principles, we can allow the law to have moral content as long as this is not understood as a necessary feature of the relationship between law and morality. But this may represent a development in Hart's theory too.

Accordingly, it is important to see that the social fact thesis as rendered by Raz, and arguably now by Hart, straight-jackets interpretive sources and logically rules out the possibility that legal systems can hold any moral content. More than this, judges cannot consider moral principles without the permission and mediation of a valid legal rule allowing for the use of now validated, therefore at best, *quasi*-moral principles. The practical upshot is that legal positivism only *allows* for but does not require moral criticism of law. Practical or effective moral criticism, then, becomes the product of taking a legal permission *assuming* the availability of them. This requirement may affect a judge's own reasons for considering available principles, and perhaps affect the way a judge reasons about a case at hand. Moral principles can be understood as only *contingently* attached to valid rules of adjudication or change since there is no positivist theoretic-requirement for morally good law. In the chance event that a moral principle does attach to a valid referential rule *its* own effectiveness is compromised, since the power to produce change falls under the effect-producing purview of the referential rule itself. The motives behind these ideas, as we know, seem to include a desire to identify laws or legal obligations unproblematically, and an alleged desire to avoid imprecision and uncertainty in the area of moral justification as it relates to law, and a desire to secure a level of social order. Unfortunately, this logic has the effect of coopting genuine moral decision-making and the full or unmediated justificatory force of moral principles. From the standpoint of legal positivism, it seems that moral criticism in law is desirable but ineffective or at least seriously hobbled, because it depends upon contingent attachment to a valid rule of adjudication or change, which strips it of, or alters, its own justificatory and effective force .

Chapter Four

In the last two chapters we examined the main features of legal positivism. We have seen that it seeks first and foremost to provide a set of criteria for the morally-neutral identification of laws. The tests used to determine the law provide judges with reasons, and therefore, with justification for applying the law once they have identified it. We also saw that legal positivists have been concerned to explore some of the relationships between law and morality. The conditions used for identifying the law make up the basics of the social fact thesis while some good part of the analysis of law and morality culminates in the separation thesis. According to Hart, legal systems and the particular laws within them can be identified when they meet certain conditions including: 1) general conformity to law; 2) systemic relationships within a valid system of law; 3) official acceptance of the secondary rules especially the rules of recognition. Strictly speaking, the features implicit in point two define the conditions of validity necessary for the existence of particular laws within the system, whereas, the three points together constitute the conditions necessary to determine the existence of the system.

Though Raz uses a different set of terms to describe the nature of a legal system and the determination of laws within it, I do not think there are any significant differences between Hart and Raz with respect to the social fact thesis. Raz discusses the ideas of efficacy, institutional character, and social sources. [1] It is clear that Raz includes both points one and three above in his description of efficacy. He equates efficacy with the idea of the "law in force" and writes that this implies that "it is generally adhered to and is accepted or internalized by at least certain sections of the population." I think the idea of institutional character or the presence of "adjudicative institutions" is implied by the combination of the three points above if we remember that, according to Hart, the union of secondary and primary rules is necessary for complex, modern societies. Finally, the idea of social sources can be understood as an interpretation or version of the combination of points two and three. For the most important thing that judges and other officials must accept is the notion of validity as the foundation of legal authority.

Of course we have seen that there are theoretical differences between the "weak" and "strong" social theses. But I have argued that the latter best characterizes the intent and logic of legal positivism as a whole especially given the requirements of establishing the soundest basis for legal authority and justification. Raz even writes that "most positivists... suggest an endorsement of the strong social thesis" and sees his task as clarifying that which is implicit in the "general terms" employed by legal positivists. [2] The crucial link between the strong thesis and legal authority and justification is made very clear by Raz. The strong thesis is required since legal authority "issues rulings which are binding regardless of any other justification." [3]

At the same time, the conditions of existence and especially the criteria of validity do limit the possibilities for the relationship between law and morality, and so they do imply a version of the separation thesis. It is the social fact thesis which guarantees that the law cannot have any necessary moral content. The social fact or the social sources thesis disbars, so to speak, the unadulterated logic and justificatory force of morality from entering into the province of law. How so? The entrance of moral argument into the determination and justification of law is coincidental or not necessary.

Further, it is controlled and preempted by cooptive, validating, referential rules whose own existence is *not* required or understood as necessary or facilitated directly or indirectly in any way by any legal positivist theoretic -requirements. When, by some coincidence, moral argument does enter into the province of law it becomes *quasi* -moral argument.

In what sense is legally-ratified moral argument at best quasi-moral argument? First, some of the reasons for considering its relevance, such as validity, are irrelevant to the strength of *moral* argument. While it is often a good idea to trace a moral principle back to a higher-order moral principle, it is *not* the logical relationship between the principles which gives them their respective force. Second, even when we find moral argument in the mouths of judges, the resulting pronouncements are justified due to their legal not moral authority. Where legal authority is concerned it is not so much what is said but who says it. This cannot be true of the strength or soundness of moral principles. Third, because the entrance of moral argument is controlled and limited by non-moral conditions, the reasons for deciding a case on the basis of a moral principle may be influenced by other non-moral, irrelevant, concerns such as the notion that the *availability* of a validated moral principle outweighs the clear moral desirability of another principle which does *not* have a corresponding legal referent. Such observations, I think, support the need for a broad critical analysis including a general moral critique of legal positivism. The present chapter makes a start in this direction.

The critical framework I employ throughout the rest of this dissertation includes: 1) a critique of legal positivism as a social science; 2) an effort to expose internal or logical inconsistencies or particularly ungrounded or weak assertions in the arguments of legal positivists; 3) a moral or external critique of legal positivism from the general perspective of natural law theory and more specifically from the standpoint of the *integrity of law* . My argument is that the three critical efforts taken together severely damage legal positivism as an adequate theory of law. This chapter discusses the first two points. The following chapters establish a general framework or theory of natural law theories and defend the idea of the *integrity of law* within it. Important with respect to this last effort is a critical exposition and defense of some of the ideas of natural law theorists, especially those of Lon Fuller, John Finnis, and J.J. Rousseau. Before I begin discussion of the first two points above , I will however, briefly introduce the main terms of natural law theory and the *integrity of law* since these ideas influence the critical effort as a whole.

The natural law critique of legal positivism is informed by commitments to ethical naturalism and certain non-consequentialist considerations. The upshot is that it must reject the social fact thesis and the version of the separation thesis which it implies. I argue that the moral critique involves four features: 1) sound justification of the law; 2) appropriate relationships amongst and between officials and subjects; 3) serious limitation of evil in law; 4) maintenance of respect for the law. These points comprise the concept of the *integrity of law* . I understand the first two points as more basic since they strongly influence the latter two.

Methodological Critique

Legal positivism as a social science argues that we can and should separate non-moral *social* from *moral* facts with respect to the determination of laws, legal authority, and the justificatory conditions important for the authoritative application or enforcement of laws. In chapter two, we reviewed the practical and theoretical terms of the social fact thesis, and legal positivism's account of the benefits associated with this undertaking. The alleged benefits included: 1) accurate description of relevant normative behaviors; 2) sharper clarification of the varied differences between moral and legal arguments, skills, and problems; 3) better accounting of ordinary language usages; 4) clarification of the different purposes or functions of moral and legal systems.

As an initial criticism, let us note that out of the four ideas above the last one constitutes the only potentially sound justification in terms of benefits offered by legal positivism. Certainty and order-achievement are clearly important and perhaps defensible goals. But points one and two simply assume the differences which themselves must be defended, and so are circular as justifications. As a justification, point three is very weak since the fact that something *is* expressed, or that some behavior *is* displayed, is irrelevant to whether or not the something *should* be said or done. Hundreds of thousands of individuals in Los Angeles, New York, and Toronto shoot heroin and smoke crack cocaine, thus constituting some sort of discourse or practice anyway. Of course, sometimes, though not with respect to the previous example, the special status of a particular person(s) involved in the saying or doing, or even the fact that majorities might be involved in the saying and doing, could be relevant in terms of granting presumptiveness or favor of argument. But this too must be argued out. A more detailed critique of the value of order-achievement however belongs properly under the discussions of particular natural law theorists and under the heading of the *integrity of law* and shall be deferred until then.

Here we must concern ourselves with the description of law and legal behavior. What are laws? What do officials and subjects do with them? Legal positivism defines a law as a member of a legal system constituted by observance of the criteria of validity and general conformity. Laws share systemic relationships with other laws within the system. Following Hart, valid legal systems may be distinguished from other kinds of legal and moral, and non-legal and non-moral systems of rules. Officials are in the business of identifying and interpreting laws on the basis of their systemic connections with other laws, and applying them to the particular cases of particular subjects. The identification of laws is accomplished when a somewhat more general rule is located authorizing the somewhat more narrow rule. Both the correct application of rules to particulars, and the proper identification or location of general rules, are guided by other kinds of general rules. The presence of this aggregate of interconnecting rules serves as a justification for the enforcement of any particular part of the system. For officials take systemic relationships as authorizations of or reasons for their own actions. According to Hart, particular subjects become subject to these actions. In other words, they come under a legal obligation. And so, what particular subjects do or think about an instance of legal obligation is irrelevant to the identification or justification of that legal obligation. For the proper identification of the law, subjects need not have any particular awareness or consciousness or understanding of themselves in relationship to the law at all. Yet they must have the capacities to be placed under the law and presumably to obey or conform to it, whatever these capacities may be.

What do laws really exist *as* under this scheme? They are not Austinian commands, or divine delineations, or Holmesean or Llewellynian predictions of the future behavior of officials, or principles of natural reason, or Rousseauan rational and willful desires of community members, or any sort of substantive moral rule at all. At one level, laws exist as supporting members of legal *structures*. Legal positivism offers a structural ontology of law. A legal obligation is a corollary attached to the definition of a legal rule. The latter, a *particular rule-form,* attains its ontological status as a function of its relationship with more *general rule-forms* , and *relational rule-forms* which define how the general rule-forms must fit together. In a sense, legal rules do not really exist at all, at least not as something *sui generis* . For at another, less abstract level, their existence is posited on the basis of the manifestation of certain kinds of especially law-identifying or determining, applying, and following behavior. The existence of standards and patterns of such behavior implies the existence of rules and grants them a *sociological status* . So, the relationships between these behavioral patterns imply the existence of a social structure of rules.

As we have seen, only certain kinds of more or less easily observable social behavior are considered relevant for the determination and authoritative application of laws. These include: 1) general conformity; 2) official acceptance. General conformity means that most people follow or conform to the law. Some can deviate from it, but the degree of deviation cannot upset the fact of general conformity. Official acceptance is a somewhat more complex arrangement of behaviors which includes parts of each of the following points: 1) an aspect of voluntarism, or an absence of coercion, or an evident willingness, or a settled disposition on the part of officials with respect to what officials do ; 2) use of standards; or the identification of particular legal sources; or the assertion of the applicability of standards to the relevant particulars including to one's self; 3) common approval of or agreement about, or belief or pretense of belief in the justice of, the most basic secondary rules or rules of recognition; or the absence of challenges to such rules; or a settled practice with respect to these basic norms.

The behaviors discussed above, along with the structural or systemic features of validity count as *social* rather than moral facts, and as social facts sufficient for establishing the existence, authority, and justified application of laws. The existence, authority, and truth of particular laws follow from the verification of an appropriate number of the features described above. Assertions or statements of law which do not meet these requirements cannot be said to be true, or exist, or have authority or any legal justification . If, as a philosopher of law, one does not agree with the schedule of the conditions of validity, acceptance, and conformity, one must just be out of the loop of truth and meaning.

The decision to distinguish moral from social facts in the way above and tie only the latter to the determination of law begs the question about the relationship between evaluation and description. Given the observations I made in the last chapter regarding the presence and undertreatment of moral concerns in the writings of legal positivists, and the relative simplicity of the forms or facts of social behavior deemed by legal positivists to be necessary for the existence of valid, authoritative law, it is clear, as John Finnis has suggested, that legal positivists generally have a "fundamentally descriptive theoretical purpose." [4] At the same time, and as we have seen, legal positivism is not empty of evaluative efforts. Again, as Finnis notes, legal positivism since Austin has undergone a "sophistication of method" primarily due to its recognition of the importance of accounting for normativity or rule-following behavior. [5]

But I think there is a certain and quite generalizable logical point to make here. That is, once one decides to move away from the extreme edge of any philosophical or theoretical continuum, and to stop the movement at a point on the spectrum short of the other extreme, the importance of defending the cessation of logical movement must not be ignored. Finally, it must be observed that critics of legal positivism have argued that legal positivism's move away from Austin begs many more questions than it answers satisfactorily. Indeed, it is at least arguable that, contrary to Hart's view, Austin can account for the existence of power-conferring rules and for the persistence and continuity of laws. In order to make this argument, one would have to consider what is implied by what Austin says about the significance of "nullities" in law and his definition of the sovereign as "a certain body or aggregate of individual persons." [6]

My discussion in the last two chapters shows that Hart at least found it necessary to improve upon Austin because of his descriptive inaccuracies, and because, from what seems to imply a moral standpoint or the standpoint of Hart's "two dangers", it remained important to differentiate between law and force in an effort to facilitate better or more clear, moral and legal thinking. It seems clear that it is important for legal theory to show how and why legal obligations are justified while coercive threats in the absence of legal criteria cannot be. Unfortunately, the social facts which serve to identify and justify laws do not adequately distinguish between law and force. As Philip Soper has argued, Hart's notion of official acceptance or the internal point of view "is implicit in any exercise of de facto power." [7] I would qualify this to say in any example of *organized* power. Mafia members, in other words, evidently will display the *relevant* internal point of view with respect to some secondary rules. This suggests very importantly that the internal point of view as described by legal positivism may not be essential to law at all. In any case, claims to the contrary must be better defended.

But there are differences between law and force. These are implied by the use of terms like the lawful application of force versus the unlawful application of force. Roughly, I think this translates into justified versus unjustified uses of force. Legal positivism distinguishes between law and force primarily on the basis of the behaviors accompanying observation of the criteria of validity. As we have seen, validity supplies the justificatory strength to judicial decisions and actions. But if organized criminals can observe the rules of validity, the latter cannot be taken as an important defining feature of law. For now, looking at things from the inside, the only difference between organized criminals and the legal authorities is that the former lack decisive or monopolized force. Thus the key difference between one organized power and another organized power with respect to their ability to claim legality is their relative force. Looking at things from the outside, in the criteria of validity we do not have a means to distinguish between law and force, rather we have one of the means to distinguish between the levels of effectiveness of organized powers possessing decisive force. But at least some of the fundamental distinctions between law and force would seem to be moral, and the drawing of such distinctions would seem to be a vital interest of legal theory.

Others have levied the same general charge. For example, Lon Fuller argues that the commitment to the social fact thesis implies neglect or inattention to "an understanding of the social context" including to the complexities of communication, interpretation, needs, and interaction. [8] Fuller attributes this neglect to the adoption of a "pointer theory of meaning" whereby meaning is understood as arising from "individual things" rather than from "general ideas." [9] Something like this charge seems appropriate given the legal positivist view that much of what judges do concerns the identification of the validity of *particular* laws within the rather vague context of a "settled practice", that is, one which accepts or does not challenge the *general ideas* upon which secondary rules are based.

Finnis also challenges the descriptive adequacy and defense of legal positivism's representation of the internal point of view. Finnis criticizes both Hart's and Raz's understandings here. The ideas of official acceptance or the view that officials believe or pretend to believe in the soundness of legal justification are both parasitic upon the ideal or "central case" of the relationship between officials and their practice. The selection of these internal viewpoints is not well defended and suggests inconsistencies. The latter are introduced and discussed just below.

Where does Finnis' notion of the ideal case come from? In part this is a logical implication. Not just any attitude toward law and subjects will do. There are appropriate attitudes and inappropriate ones. We need to explore the grounds of this belief in the appropriateness of certain attitudes. What is the standard of appropriateness? Are there objective and justifiable grounds for it? If there is something objective and justifiable to believe in, it makes sense to foster belief in this something. Requiring the pretension of moral belief on the part of officials does not seem justifiable or even effective in this regard unless one wants to be Machiavellian about it. I would argue that these grounds originate roughly from the only place that an internal viewpoint with respect to law could come from. We all recognize that systems based merely on force or coercion do not qualify as law and that one of the important distinctions concerns *willingness* to accept law as legitimate even when sacrifices are required. Logically, the attitude in question is relevant to both the movement away from force and the maintenance and preservation of the new system based on law. But as Finnis shows, the internal viewpoints described by Hart and Raz as essential to understanding the differences between law and force are inadequate as explanations of the movement away from "the defects of pre-legal orders" and do not account for the long term maintenance of law.[10] Officials who generally are motivated by self-interest or power, or who think the laws of the system are generally unjust and should be overthrown, or who just go along to get along, or go along for no reason at all cannot account for the creation of a legal system or its longer term integrity or health.

In sum, legal positivism as a social science seems open to the general criticism that it inadequately defends its commitment to choose and account for law as opposed to force on the basis of a narrow range of social facts. Even if Hart and Raz were found to be committed only to describing how particular laws are identified within an *established* system of law, the internal attitude each claims is common to and necessary for judges to have does not show important differences between law and force. Even if we granted that the criteria of validity and official acceptance, or the sources thesis and official belief or pretense of belief in legitimacy were sufficient to identify particular laws in a going system, it does not follow that judicial decisions to accept the basic rules of a system and to take and apply the particular laws identified through these basic rules as authoritative are themselves morally-neutral.

Everyone might agree that the Capo *said* "since X is covered by Y, X must be done" and even *accept* this as an authoritative utterance establishing a legal obligation, and the Capo and his bosses might *accept* X and Y voluntarily. But *decisions* to apply, enforce, or follow X must be understood as requiring additional justification. We can see Hart, in particular, again throwing up his arms in disbelief, frustration, perhaps even feeling a bit persecuted saying that the legal obligation "X must be done" *only* means that persons are subject to the rule X and the sanctions behind it. But then again this distinguishes not law from force. The problem is that even the *taking* of the combination of XY, the various levels of acceptance, and the Capo's utterance as a reason for holding persons under X requires much more justification. The same holds true in law. In the case of those like Raz who agree that the legal obligation "X must be done" means that persons coming under it *ought* to comply, and who therefore agree that justification is necessary, vastly weaken the idea that law is essentially a matter of non-moral or social facts.

To get the to the proper sense of an obligation to do something, one must refer to functions, purposes, general objectives or values. All the critics of legal positivism agree about this point. In addition, it seems that contemporary legal positivists can take a lesson from the so-called father of legal positivism, Austin himself, who unabashedly recognized that the point of a legal system was to establish nothing more than a minimal social order backed by threats while linking it as a necessary condition to the establishment of a Utilitarian social ethic.

Some Notable Inadequacies

In this section I want to recapitulate the inadequacies in the various arguments made by legal positivists. All of these ideas will be discussed in further detail in the following two chapters. But this section has its own special emphasis. Here I organize the material around two themes: 1) *internal* weaknesses and inconsistencies; 2) association with the two main features of the *integrity of law* , namely, justification and the appropriate relationships between and amongst officials and subjects. I understand an internal inconsistency as a discrepancy or disagreement in the way terms are used or claims are made. A weakness is understood as a particularly poorly defended argument or claim. The second theme is discussed just below.

The first five inadequacies below relate primarily to the nature of justification in law with some overlap into the question of the relationship between officials and the law. We have seen that there are two kinds of justification including an internal or systemic sense, and an external or moral sense. I think legal positivism may be criticized in both areas. The weaknesses and inconsistencies in various arguments supports the need to find a more acceptable set of justificatory criteria. The latter emerges from the next three chapters which develop the general framework of natural law and the *integrity of law*. The next two inadequacies relate primarily to the proper relationship between officials and their practice. The last two difficulties noted below concern proper relationships between subjects and the law. As we saw in the second chapter, legal positivism deals narrowly with the question of what officials or judges do and ought to do, and little or not at all with the question of what subjects do and ought to do. The present treatment justifies the need to look more closely and critically at especially the functions and responsibilities of all those who come into contact with the law.

First, Hart employs two senses of internal justification. I do not consider this to be an inconsistency since he is forced by the systemic logic of validity to adopt the two senses. However, I do consider this a weakness since it begs the question about the relationship between the two senses, especially with regard to what they are supposed to accomplish. Where primary rules are concerned internal justification follows from the systemic relationship between the primary rule and any number of secondary rules *and* from the fact of official acceptance of at least some of the more basic secondary rules. Justification follows because officials take these facts as sufficient reasons for asserting that particular laws exist and persons are subject to them.[11] So, for example, judges might refer to the validity or systemic position and acceptance of constitutional rules or legal precedents as justifying their decisions to hold persons under a legal obligation and to punish them if they do not comply.

But where basic secondary rules, especially the "ultimate rule of recognition", are concerned the grounds of existence and justification seem to reduce down to mere acceptance or conventionality. If judges are called upon to justify their use of the ultimate or most basic rule(s) all they can refer to within the boundaries of internal justification is the conventional practice itself or their acceptance of it. [12] But as a form of justification in all other walks of life this must be considered a very weak one. Perhaps we can imagine the basic law saying "I am used therefore I am justified."

Second, and related to the above points, legal positivists use the term "validity" in ambiguous ways. Hart uses the term validity to describe the "legal structure" itself or to the "union of primary and secondary rules" [13] and to cover the idea of a validated or authorized particular law. On the other hand, even though, as we see just below, Raz seems to deny it, [14] Hart also uses validity as a term of justification. [15] In Hart's view, judges refer to the systemic position of particular laws and to official acceptance of secondary rules as *reasons* for their decisions. Further, as we saw in the last chapter, there is also a sense in which the criteria of validity cannot explicitly bar judges from consulting moral principles. Given Hart's concerns about the "two dangers", I surmised that this betrays an unacknowledged moral function attached to validity. In any case, it is obvious that there are multiple meanings of validity or its functions used here and that they are inconsistent with the idea that the criteria of validity allegedly constitute morally-neutral social facts solely used to determine the existence of laws.

Now Raz recognizes the problem of ambiguity here and tries to smooth out these difficulties by suggesting that we ought to adopt the term"systemic validity as a law" to refer to its systemic position which establishes that a law is "justified as such", and the term "validity of a law" to refer to the sense in which it is justified "for some reason or other" or on the basis of "the goals or values which it serves or harms". [16] This stipulative effort does not however solve the problem of inconsistent usage since a judge can take "systemic position" as counting as "some reason or other" for holding persons under legal obligations, and because both senses have normative consequences. Further, Raz does not sort out the weights which must be attributed to the two forms of validity or the relationships between them. Finally, he does not explain how a law can be justified if it "harms" the values or goals it "serves." This formulation then qualifies as an adjunct weakness on top of an inconsistency.

Third, Raz's argument supporting adoption of the "sources thesis" seems particularly thin. Now at first sight, the sources or "strong social thesis" seems established on assertion and stipulation. But Raz offers two arguments allegedly supporting the merits of the "strong" over the "weak" social thesis. Recall that the former disallows any unmediated references to moral arguments for the purposes of identifying law, whereas the weak thesis "sometimes" but never necessarily allows this to occur. [17] Now Raz seems to disregard the significance of the first part of his argument since he says that the fact that the strong thesis explicates "the common view that judges both apply the law and develop it" really amounts to a "reflection of a superficial feature of our culture." [18] So the conclusion rests entirely on the second supporting reason which is that the strong thesis "captures and highlights a fundamental insight into the function of law." That is, it best identifies the way in which binding legal obligations are created which in turn facilitates "schemes of co-operation, co-ordination, or forbearance." [19]

I think there are two main weaknesses here: 1) With respect to the first argument, logically it remains the case that the weak social thesis at least "sometimes", and I would say probably much of the time, also reflects differences in some of the language commonly used to describe what judges do in cases with precedents versus cases without them. 2) The same criticism can be made against the second argument. For the weak social thesis too, and a great many other social, political, and moral perspectives, capture the not terribly profound insight into the importance of achieving coordination in society. Raz must show empirically that adopting the strong social thesis significantly outperforms the weak social thesis in terms of explaining this sense of order-achievement. I doubt that this is plausible since Raz probably could not require more than Hart's "minimum of co-operation" in the first place. [20]

Fourth, one of the important objectives of legal positivism, and presumably part of the point of the social fact thesis, is to differentiate between law and force. As we saw in the last section, Soper shows that Hart's description of official acceptance fails to make this distinction since organized criminals can exhibit the relevant attitude in relation to the basic rules defining their practice. I would add that Raz's reformulation of official acceptance which includes the pretense of belief in the justification of the most basic rules fails for the same reason. This constitutes weakness of argument in relation to legal positivism's stated objectives.

Fifth, Hart's view of the relationship between nature, law, and morality involves some inconsistencies and other weaknesses of argument. First, it seems strange to characterize the sorts of natural vulnerabilities, Hart identifies accurately for the most part with the goal of survival, as somehow subject to change. [21] Assuming the implausible for the sake of argument, even if most or all of these vulnerabilities were to evolve away, it is doubtful that we would then remain in the presence of *human* nature. So it seems that Hart's discussion here includes inconsistent usages of the terms human nature and nature. This is related to another weakness.

As things stand, Hart argues that legal systems cannot have just any content because of the natural pressures of survival. But is it accurate to say that law *per se* or legal systems respond or react to such basic needs? [22] The only necessary response is one where the interests in survival of a few powerful persons are secured. But this means that coercive social systems *not* necessarily legal systems must respond to survival. This points us to another related inconsistency or weakness.

As we saw above, Hart agrees that morality influences law "at all times and places. " [23] Then why does this not necessitate a legal-theoretic requirement for referential rules tied to moral contingencies as part of the criteria of validity ? As a practical matter, this seems like an astounding lapse.

Finally, we should note here that the natural conditions cited by Hart do not in fact necessitate the legal conditions and classification of laws identified by Hart. For example, the vulnerabilities he describes do not logically imply that laws generally must hold sanctions or that there must be a set of laws regulating private property. [24]

Sixth, Raz and Hart both describe or propose possible external justifications of law. For example, Raz as we have seen, suggests that law can be justified on the basis of its achievement of order, certainty, or co-ordination. [25] It seems odd though, that maintenance of these goals is not counted as part of the *necessary* justificatory datum available to judges as they apply the law. As noted previously, Finnis criticizes Hart and Raz on just this point with his notion of the ideal or central case of judicial decision making. Fuller, too, observes that legal positivism lacks a concept of a judge's *role-related responsibilities*. [26] These criticisms highlight a weakness in legal positivism's understanding of what judges do and ought to do.

Seventh, closely related to the points immediately above, we saw that Finnis shows that the relevant internal official attitudes described by legal positivism are not sufficient to account for movement away from pre-legal social systems since they do not entail substantial commitments to *maintaining* the values or benefits of better adjudication and adjustment to change produced by a complex system of legal rules. This is a weakness considering the importance legal positivism attaches to explaining the nature and development of modern legal systems.

Eighth, there seems to be some inconsistency between legal positivism's ideas about what *particular* subjects must do versus what subjects in the *aggregate* must do in relation to the issue of the identification or the determination of law. As we know, both Hart and Raz include the requirement of general conformity amongst the conditions of the existence of law. So, clearly, what subjects generally or in the aggregate do about their legal obligations *is* important to the identification of law. Subjects generally must conform to or obey or follow the law. But if majorities did not *follow* the laws and instead found themselves generally suffering the consequences of law's monopoly on force we could not really speak about the existence of a broad *normative* system. The normativity of a system is different from effectiveness based on coercive sanctions. For it means that standards are being used generally as guides for behavior not that the sanctions behind the standards are being generally or constantly imposed. Logically, individuals in the aggregate must then have *rule-following* capacities and these must be respected matters of official concern.

Unfortunately, legal positivism is basically silent on the constitution of this capacity at both social or aggregate levels and at the level of particular individuals. Strangely, what *particular* individuals do about their legal obligations does not seem to matter. Perhaps it is just assumed that the coercive aspect of law will pick up a few recalcitrant individuals and everyone else will be conformist in their relationship with the law. In any case, it matters much what occurs generally or in the aggregate. For here we cannot allow the force behind law full sway unless we want to sacrifice the sense of normativity. But if the aggregate matters then the particular individuals who make up the aggregate must matter too. Hence, we see the inconsistency mentioned above. So, we must flesh out, now that we have flushed out, the importance and nature of the individual's rule-following capacity. For it seems necessary to the identification of law itself since laws as norms must be consistent with and respect this capacity.

Ninth, the comments above about inconsistent theoretic-requirements for individual subjects versus aggregate-subjects with respect to the identification of laws and legal systems, very clearly show another related weakness. When it comes to describing the normative context of law, legal positivism focuses all its attention on what officials do and must do, and none at all on what *individual* citizens must do. Are we to understand the normativity of law as extending only to officials and not at all to citizens or subjects? Recall that Hart argues that statements of legal obligation only mean that persons come under rules, whereas Raz allows that they mean that persons ought to obey the rules because they are justified. Hart's problem is that his understanding of the meaning of legal obligations does not seem to account for how or why it is that subjects in the aggregate generally conform to the laws of a genuinely *normative* system. Raz's problem is that he begs questions about the substance of justificatory reasons behind ought-statements. If law constitutes a genuine and broad normative system, everyone's rule-following capacities must be accounted for and this entails a deeper look at the problems of justification than legal positivism allows.

Even Hart's view that statements of legal obligation mean that individuals are held to be bound to them implies that it is *possible* for them to obey the law, or discharge their legal obligation. And in real social systems, that is, those outside of say ant colonies, this further implies that if individuals do not comply they may be properly held *responsible* for their actions. But this implies that they are *rational* individuals and so the need to define, indeed make value judgements about, at least *some* of the "relevant characteristics of human beings" important to responsible and rational rule-following, and the relationship between these and the existence of law. I submit, against Hart, that legal theory has every reason to enter seriously into substantive debates about the relationship between say, rational capacity, racial or gender characteristics, inequality, and justice. [27] For any proper sense of holding an individual under a legal obligation must be as certain as possible that the individual actually carries the requisite rule-following capacities. Otherwise, we are not speaking of a *normative* system at all.

This last point reminds us that legal positivism's commitment to allegedly value-neutral identification of the non-moral social facts of laws and legal authority actually assumes values like the importance of order and certainty, and official internal attitudes, and has strange consequences like the attachment of legal validity or justification to genocidal regimes. This in turn reminds us of the charge I brought against legal positivism at the outset of this dissertation. Legal positivism seeks to establish and maintain in the philosophical and theoretical discourse about law the legitimacy and equality of a set of legal concepts against independent, and in practice, rival moral concepts. Through the concepts of validity, justification, normativity, and obligation, law and legal institutions become authoritative, sanction-bearing contenders for the allegiances and support of many individuals. But legal positivism for the most part ignores the necessarily practical and social and moral context of law. Positivistic pretensions lead some legal positivists to unfortunate uses of the terms *morality* or *moral system* to describe what organized Nazis or racial bigots or those who practice genocide do. [28]

There is little effort to understand the necessary relationships between law and morality. For the "broader view of morality" [29], I think, boils down to a particular kind of *attitude* or a set of attitudes according to the terms of legal positivism. Moral systems are characterized by the adoption of attitudes of "importance", "immunity from deliberate change", "voluntarism", and moral forms of pressure.[30] Here, moral systems are being characterized as sociological types. Seemingly, a system which allows a small but dominant group to pull the toe nails off of everyone else's babies is evidently just as genuinely a *moral* system as one in which the vast bulk of the population participates cooperatively and peacefully in the production of its needs as long as the relevant attitudes toward standards other than legal ones can be observed. That is, as long as people in society attach great importance to pulling toe nails off of infants, and chastise others on the basis of, for example, defective moral character if they resist this norm, we can speak of a moral system.

Now I sure do not want to make the mistake of equating the terms morality and moral right. Nor do I intend to suggest that legal positivists are saying that so-called moral systems endorsing nail-pulling are morally justifiable. But there are two related problems here. First, given the difficulties associated with philosophical approaches like emotivism discussed in Chapters Five and Seven, it is simplistic to describe moral systems in such bare attitudinal and sociological terms as Hart does. This is also so because of the second problem. For it is not possible to seriously take up the allegedly *moral* attitude described by Hart in relation to just *any* principle. I think the situation described above which holds such obvious moral *wrong* and evil cannot be described as a *moral* one because at a very fundamental level, there is a linkage between rationality and morality and moral right. It is ridiculous to imply that any *rational* person could think that pulling toe nails off of babies was justifiable because it was *itself* the morally right thing to do, that is, because important in one of the *moral* senses of the term "importance" implied by Hart. This could not be the basis or justification of such despicable action because some things cannot be "taught ... to *all* in society." [my emphasis] [31] There are certain limits to the "broader" view of morality since rational individuals cannot be taught that just anything is important in Hart's sense of moral importance.

On the other hand, no doubt the individuals in power might rationalize their behavior toward the babies in many ways having a basis in their interests in power or understand this behavior as a sacrifice commanded by some spiteful god. In the latter case, I would argue that we are dealing with non-rational behavior. In the former case, we are dealing with the unfortunate lengths to which instrumentalist reason and self interest can be taken. In neither case is there sufficient reason to speak of moral systems. Further, it is wrong to view the actions in question as *legal* just because they meet the requisites of validity because it is also wrong to grant such actions *any* sense of justifiability or acceptability or normalcy at all. Clearly, legality implies the former ideas. There are minimal standards of right and wrong which rational individuals can work with and the actions in question are included in this set and must be respected in law as such.

Chapter Five

It is nearing the time to consider the specific criticisms and alternative proposals to legal positivism offered by various contemporary natural law theorists. As a way of accomplishing this critical exposition, I develop in this chapter the foundations of a general theory of natural law, and in the next three chapters I discuss specific theorists toward the end of offering a classification of natural law theories as well as a moral critique of legal positivism, and then in the following chapter I identify and defend the concept of the *integrity of law* implicit in natural law theory generally. So, the purpose of this chapter is to set out the defining features of natural law theory. This also serves as a preliminary to the classification of particular natural law theorists and their own theories, and as a way of grounding and partially justifying the concept of the *integrity of law* . The defining dimensions of natural law theory include: 1) a commitment to ethical naturalism in relation to the identification of important human needs; 2) a non-consequentialist approach to the nature of moral life; 3) rejection of the social fact thesis; 4) rejection of the separation thesis. These dimensions are well represented in the theories considered in the next chapter and help to account for the content of the *integrity of law*.

Why is it important to examine the general features of natural law theory? As we know, natural law theory is not just a legal theory. It is a comprehensive moral, political, and legal theory. From its standpoint, it makes no sense to have an independent legal theory. It then rejects the positivistic pretensions of legal positivism I introduced in the second chapter. We must explore its general features in order to gain a full understanding of the strength of its moral critique of legal positivism. Because we are operating at technical epistemological and ethical levels here, this particular chapter is more jargon-laden than others. As a result, I make a special effort to define terms and their points or purposes.

General Features

Natural law theory is a difficult theory to define for a number of reasons including: 1) the diversity of chronologically distant theorists claiming legitimacy for their theories on the basis of nature; 2) the abuse and scorn heaped upon natural law theory by those claiming that it is "metaphysical", or "idealistic", or a variant of the "naturalistic fallacy", or a "non-theory", or a "slogan", or hopelessly and impractically inclusive etc. Nonetheless, there is a tradition which includes importantly Aristotle, Cicero, Aquinas, Suarez, Rousseau, Fuller, and Finnis but also quite a few others, which exhibits certain core commitments and principles. We can isolate this framework because not all those who utilize nature as a justificatory vehicle for their principles are for that reason natural law theorists. Likewise, I would contend that some good part of the negative criticism noted just above is either the premature product of uninquiring or uninterested minds, or the rhetorical product of opponents of natural law theory, and so are less than authoritative pronouncements.

For preliminary purposes, I want to say that the natural law tradition referred to just above is a coherent tradition both in terms of its content and the distinctions between it and other philosophies of law. First, natural law theory is not a theory of law as essentially a *command* or the authoritative and positive pronouncement of the sovereign, whether this sovereign be understood as a god, or a queen, or a military dictator, or a legislative assembly, or the people at large. Second, while natural law theories do sometimes recognize the force of a sovereign *will* or of Divine sanction or sheer power, natural law theory as a whole is fundamentally a *rationalist* theory which assumes that a universal and rational response to facts about human inclinations and needs can be given. Since the opportunity to deal rationally with human needs exists, especially in circumstances of political power and organization, the legitimate authority of political leaders derives from their efforts to meet needs within the context of the *common good*. While the common good must be secured, natural law theory attempts to take account of and condition appropriate political and moral responses to needs to other facts about human imperfection, the coercive nature of political power, and the tension between individuals and their organizations. Third, the principles of natural law theory are not derivations from certain *expediencies* concluded from the facts of human imperfection, coercive power, and the force of individuality or of social organization. For example, from the standpoint of political effectiveness or efficiency alone, one might justify aspects of democratic rule. But this is not the prescription of natural law theory. Bringing about the common good is the morally right thing to do not the politically expedient thing to do.

At this point, again as a matter of clearing away certain preliminaries, I should defend further my focus in this dissertation on modern and contemporary natural law theorists, rather than more classical ones. Natural law theory is nearly a timeless philosophical approach to morality, politics, and law. One of my main concerns here is to see how natural law theory can be applied to modern and contemporary political and moral problems and contexts. For example, I discuss in detail below, the relationships between natural law theory and both democracy and distributive justice. Further, as is already obvious, another purpose is to engage legal positivism directly. Modern and contemporary natural law theorists are best suited in these regards. My purposes here really do not include historical exegesis, but most importantly, evaluation and criticism of legal positivism, and the effort to draw out and develop first the general theoretical framework of natural law, and second, the concept of the *integrity of law* which I argue is implicit in natural law theory. At the same time, I do not run rough shod over historical origins and accuracy because the modern and contemporary theorists discussed here do not themselves run roughly over the history and tradition of natural law. They are self-consciously part of it. This is most obvious in the case of Finnis who ties himself solidly to Aristotle and Aquinas. Though I do not argue it outright here, I think there are clear connections between Rousseau and classical proponents of natural law or of aspects of natural law. For example, one could develop the specific relationships between Rousseau and Stoicism. Excellent reviews of classical and medieval contributions to natural law theory can be found in A.S. McGrade's "Rights, Natural Rights, and the Philosophy of Law" and in D.E. Luscombe's "Natural Morality and Natural Law." [1]

Ethical Naturalism

Ethical naturalism is, strictly speaking, a metaethical theory employing a *cognitivist* epistemological commitment. In other words, under ethical naturalism we are concerned with the possibility of gathering knowledge about the moral world. It is cognitivist because it holds that moral statements report something about the moral world. To make a moral statement means that something about the moral world *is* being reported or described. In other words, moral statements stand as statements about the strength of a person's moral reasons, the relevancy of intentions and motives or other moral attributes, the moral rightness or wrongness of a person's actions, and the desirability of particular goods or states of affairs. Moral statements such as evaluations and judgements involve appeals to reasons and reasoning. They do not function as in non-cognitivist theories, as vessels for or carriers of emotion-based outbursts or attitudes, or as expressions of attitudes, or as mere manifestations of conventions, or as examples of more general language functions.

Under the emotivism of A.J Ayer [2], apparent moral statements cannot really be said to report or describe anything moral since they are understood essentially as ways of emoting. Statements like "Oliver North would make an excellent U.S. Senator" or "Oliver North would make a horrible U.S. Senator" or "Oliver North did what needed to be done and in any case meant well" are akin to the respective clapping or groaning responses elicited by one of Oliver North's political speeches. Since *good* X means X is desired, X ought to be done must mean that X should be desired too. But if you say instead that X ought not be done it appears that we have the semblance of an argument. This conflict, however, cannot be understood as a real argument since clapping and groaning and what causes such responses cannot really be defended. Even if we take the view that the statement 'X is good' functions as an expression of one's or society's attitude toward X, non-cognitivism takes the position that such expression involves psychological grounds of desire and emotion. These grounds account for one's interest in or the attractiveness of X in the first instance.

In the different and much more complicated case of the prescriptivism of R.M. Hare [3], such statements are understood as particular manifestations of more general language-functions. For example, there is no difference in the *meaning* of the uses of good in the statement "that was a good shot at a good president." Both uses *commend* something but may or may not imply recommendation of an action. When we use the words good and bad we only mean to praise and blame and often but not always for others to do the same. That is, it may not ever be important to make good shots at what one is shooting at, or to try to be a good president, let alone to take such shots at such presidents. Under prescriptivism, in cases of commendation, there can be no objective moral facts or reasons being referred to, and most importantly none which inform, ground, or help justify the apparent evaluative criteria used. For the criteria of evaluation itself changes from context to context, object to object, and even from person to person.

According to prescriptivism, there can be no objective basis for moral commendation or for moral principles. Philosophical or social scientific objectivity and analysis is restricted to evaluations about the way language is used across practical and situational contexts. The objective meaning of "good", for example, is its *common* function as an indicator of commendation across use-situations. Under prescriptivism it is neither possible to speak of the objective basis of such valuations *within* or pertaining to specific classes of actions or objects nor *across* them. The basis of valuation seems to reduce to a personal choice, and therefore, seems to rest on a form of relativism.

Given these qualifications, it seems that prescriptivism occupies rather uncertain and ambiguous ground between the extremes of emotivism and cognitivism. For persons evidently may be said to choose from *amongst* a set of moral values. But neither the choice nor the set of values stands on any objective rational or justificatory basis. Unfortunately, as Charles Taylor points out, this view has some serious problems. First, though it seems to countenance a distinction between on the one hand, the sorts of *expressions* persons must make under emotivism, and the making of commendations on the other hand, it provides no apparent grounds for the difference, or at least none that seem more than purely stipulated. Second, it seems to deny the importance of drawing distinctions between the idea of making a commendation *without* reasons with the idea of a judgement or an evaluation and prescription based on reasons. [4]

Probably the problem here is Hare's exaggerated focus on the logical functions of language. Perhaps commendation is logically distinct from description. If I say we ought to try to achieve justice in our time, no doubt, I am likely prescribing a course of action. But why must one pretend, suggest, or imply that there are no important practical connections between prescription and description, and more importantly, that these connections add genuine *meaning* to the former? After all, we say that ought implies can. Further, and related to this, it does not seem plausible that personal choice over all matters of commendation could be as free as Hare suggests. If there are common needs and interests, as I argue later, then the determination of at least some moral standards cannot be nothing but a matter of choice, though our conformity to them certainly can be. Philippa Foot makes these points very clear in her article "Moral Beliefs" where she discusses various limits on the nature of choice with respect to the determination of moral value. [5] Finally, why suggest that the most philosophically interesting point about statements like 'Ghandi was a good person' and ' That was a good hamburger', the latter being something which Ghandi, of course, probably would fail to comprehend, is the fact that they share the language function of *commendation* . It seems to me that objects of commendation deserve as much or more treatment than the concept of commendation itself. This is like saying that reading the dictionary develops the understanding better than, say, reading Plato's *Theataetus*.

But it seems logically open to take the position that some moral *properties* can be described but that no objective judgements about moral right and wrong can be made. Perhaps this is the position of prescriptivism after all. If this is a logically-open position, it jumps the gun. For all a highly skeptical cognitivist or prescriptivist is justified in arguing is that *so far* we have no certain knowledge of moral right or wrong.

Generally speaking, cognitivists such as Stephen Toulmin, Kurt Baier, and J.J. Kuperman [6], hold that there is some *independent* moral knowledge, while non-cognitivists must deny this. But knowledge about what exactly? Let us understand the field of morality as comprising decisions and actions about issues which divide and unite communities and larger societies. The point of morality must be the holding of communities together within the constraints of legitimate but divisive interests. First of all, cognitivists argue that there is a place for reason *in* morality and ethics. The latter emphasis is critically important. For no one, not even non-cognitivists, doubts that there is knowledge *about* ethics. In other words, the study of various moralities uncontroversially yields knowledge. But non-cognitivists invariably reduce this knowledge to psychology or sociology, and at best cordon off the area of ethics from morality, assuming that the former area can be explored value - neutrally with the tools of logic and that investigation of the latter soon becomes mired in relativism or subjectivism. Cognitivists, while not denying important links to psychology and sociology, argue that moral judgements and evaluations are not fully reducible to these terms and involve genuine knowledge about the nature of right and wrong.

Like Kuperman [7], I do not think that the *general* position of cognitivism necessitates any particular view of the ontology of moral values. Nor do I think that cognitivism implies the naturalistic fallacy. In other words, we need not posit the independent existence of *moral* values or properties. Nor must we equate descriptions about natural properties such as those associated with needs or interests with what is deemed good or with what ought to be done. At the same time, we must be able to see that it is *reason* itself and *reasons* which are the tools used by agents in ethical and moral decision making and that the use of reason produces knowledge within moral and ethical enterprises. I think it is important to speculate briefly about what has motivated the conflict between cognitivists and non-cognitivists. The dispute obviously involves choice between a generally philosophical approach to morality versus a more scientific one. Underneath this distinction, though, rests a more serious issue. For the appeal to reason *in* ethics, I think, entails appeals to freedom and responsibility in the moral affairs of humans. The preservation of freedom is contingent on the taking of responsibility. On the other hand, the reduction of moral judgements to psychology and sociology, that is, to *causal* accounts of apparently moral statements, denies freedom and responsibility or at least works to shrink their spheres.

Let us make no mistake about it. Hart's legal positivism is a thoroughgoing non-cognitivism. He argues this explicitly in Essays on Bentham. He writes in reaction to Raz's view of the role of reason in legal practice, "Far better adapted in the legal case is a different, non-cognitive theory of duty according to which committed statements asserting that others have a duty do not refer to actions which they have a categorical reason to do but...refer to actions...which may be properly demanded or exacted from them." [8] Legal duties exist because properly demanded and rest on the purely *conventional* practice of official acceptance of the norms associated with such duties. This suggests too, an underlying view, not unlike prescriptivism, that legal duties are duties because manifested by something like a corresponding speech-form.

Judges and officials need not inject further reasons into the content of the speech-form *those things properly demanded of others* which evidently constitutes the having of a duty. The assertion of a speech-form is its own reason. But, of course, it does not seem likely that they do or would govern their own behavior, internal to the practice of law, in this way. In so far as legal positivism offers a view of the role-responsibility of judges, it seems to argue, on the contrary, that judges do require reasons why they must perform their own duties as judges. The rather scanty reasons offered to them by legal positivism include the recognition of facts like conventional acceptance of rules and certain systemic relations between rules. On the other side, in so far as the subject's recognition of a duty goes, a person subject to a duty might, but need not, experience it as an imposition, or as Hart says, as something to be "exacted" from the subject. Further, there is no significance for the understanding of duty, attached to the possibility that recognition of a duty might also involve the recognition of a reason to perform it by a person subject to it. So, again, as we saw in the last chapter, there seems to be some inconsistency between what is required of officials versus what is required of subjects. Hart simultaneously deflates the kinds of reasons appropriate to judicial role-responsibility and inflates the sorts of reasons allegedly expected by subjects through his mention of "categorical" reasons.

If, on the other hand, Raz's view qualifies as a cognitivist one, in that being held under an obligation implies that there is a reason to perform the action, he falls very short of examining the grounds for and the context and substance of such reasons. The practical upshot of his understanding of duty is confusing. On the one hand, Raz seems to say that persons having duties require reasons to perform them. On the other hand, judges evidently are able to satisfy this requirement by supplying subjects with what amount to non-reasons, that is, with lies. We can say from the three paragraphs above, that legal positivism as a whole swims in the cloudy waters of the confluence of the River Non-Cognitivism and the Sea of Cognitivism.

Natural law theorists are committed, as we have seen, to cognitivism. This commitment necessitates that natural law theorists examine the grounds for and substance of reasons in ethics and morality, and this leads them into *naturalism* . They must and do argue that moral properties can be described and that reasoning about the nature of moral right and wrong is genuine. This is the sense in which they qualify as cognitivists. Natural law theory is also an ethical *naturalism* because it draws the material or objects or the goods which help to ground and focus moral statements and actions from human nature . The raw material of moral judgement and action may be described as shared or common desires, inclinations, aspirations, and needs. It is not the case that whatever is desired is automatically good and worthy of achievement. For reason must mediate between natural desires or inclinations or *potential* goods on the one hand, and the actual *valuation* of human or social ends or objectives in terms of right and wrong on the other. The constituents of ethical naturalism themselves cannot supply this right-making function. In other words, there is a rational relationship between desires and moral values or principles. While non-cognitivists deny the significance of this connection for knowledge about ethics, legal positivists deny the significance of this connection for legal theory. Reflection on the comprehensive set of inclinations or potentialities, and our experience of them, helps to show their cultivation as desirable and important to achieve in action. In this sense, we can say that right reason and moral judgement are indeed rooted in the nature of things. For natural properties do function as key though not as exclusive sources of moral knowledge. Human capacities, inclinations, and needs for example, do affect the possibilities for moral education and development. They can and do serve as indications of goods, and with a certain amount of interpretation, can be formulated into useful models.

It is also not the case that what ought to be is deduced from or equated with what is. Ethical naturalism as employed by natural law theory does not commit the "naturalistic fallacy". It does not equate or identify moral valuation with the existence or fact of a natural inclination or other natural property. Nor is it the case that inclinations are understood as built-in purposes which *necessarily* regulate human nature, or determine or in any way guarantee just or moral outcomes. For we are speaking of *potentialities*. Just because nature can go awry, as Aristotle noted, does not mean we should not pay attention to it. So we should not assume a simplistic teleological component whereby human nature is thought to unfold more or less unproblematically toward its functional or mature end. Since teleology itself is ambiguous, and in its various simplified forms such as that above, does not tell us anything of real importance about natural law theory, we should discard the term. I argue similar conclusions with respect to other heavily-baggaged concepts below.

Now, like Shadia Drury[9], I would not want to exclude Kant altogether from the natural law fold. But it seems clear that Kant cannot qualify as an ethical naturalist. Still, Kant argued for the existence of objective rational and moral standards, and rejected the separation thesis, and so I think would have rejected the alleged relevance of the legal positivist distinction between social facts and moral facts for the determination and justification of law. But I have already argued that ethical naturalism is a defining dimension of natural law and this disqualifies Kant. My contention is that when it comes to the identification of specific human interests, needs, and goods, natural law theorists must employ natural inclinations as key constituents of the decisional and interpretive background, or as sources of moral and legal principles and rules, and on this basis qualify as ethical naturalists. Since Kant does not do this, my conclusion is that he cannot be a natural law theorist in the full sense, but he might contribute to the natural law position in important other ways.

While ethical naturalism can be and often is a component of consequentialist theories, its *function* is logically and practically distinct from the other characteristics of these theories. Ethical naturalism involves reference to non-moral facts usually defined in terms of natural inclinations, and shared characteristics and needs. The moral relevance of these inclinations is that their proper development or cultivation is considered desirable. This function stands apart from key consequentialist ideas including the notion that the determination of right and wrong is based *solely* on the production of states of affairs, that there is an essentially *instrumental* relationship between actions and goods, and arguably, that goods ought to be *maximized* . In other words, it makes sense to separate for the sake of precise analysis, the assumptions going into the effort to identify the grounds of desirable goods, from the effort to incorporate such goods into every day moral business. In other words, it can be useful to explore the implications of combining different metaethical features with normative or ethical theoretical features such as the non-consequentialist features discussed below.

What I am claiming for the relationship between ethical naturalism and natural law theory is that the former functions as a device to identify natural inclinations and shared attributes of human nature the proper development of which are relevant to moral right and wrong. As we will see in our discussion of Finnis, such inclinations even include sources of moral reasoning itself. But, strictly-speaking, ethical naturalism only anchors our ship. We still need to right it, so to speak, or send it in the proper direction. For this, we must consider the non-consequentialist implications of the way in which natural law theory treats goods once they are identified. I discuss this in the next section, and in more detail in the discussion of Finnis in the next chapter. Natural law theory tells us to deal with the development or achievement of non-moral goods in a non-consequentialist way. The methodology of moral and rational decision-making associated with natural law theory is thoroughly non-consequentialist.

Non-Consequentialism, Moral Being, and Action

Whereas ethical naturalism operates initially or primarily at epistemological and metaethical levels, setting out the foundations of moral knowledge, describing some of the boundaries between moral and non-moral categories, and identifying morally-relevant natural properties and goods, we still must set out the criteria of moral right and wrong with respect to non-moral goods in practical terms. Natural law theory accomplishes this latter task in a non-consequentialist way. I do not mean to imply that natural law theory is a deontological theory. While there are similarities between natural law theory and what is commonly held to fall under the rubric of deontology, the natural law perspective on the nature of good disqualifies it from deontology. Strictly-speaking, the latter refers to the idea that the determination of right and wrong cannot be tied *solely* to consequences usually understood in terms of social utility, or that *some* actions are right or wrong apart from their consequences for the good. Such actions are right or obligatory *in themselves* and do not need to be referenced to *any* conception of the general good. Because natural law theory focuses on the overriding importance of developing natural inclinations and goods in a certain way, it cannot be viewed as a deontological theory.

There may be two reasons why some have argued that natural law theory is deontological. We might identify an etymological basis for this assumption. Many texts on ethics begin analysis of deontology by noting its roots in the Greek words *deont* and *logos* . The former refers to that which binds one presumably to certain decisions and actions. Taken together the terms translate into the study of obligation-making characteristics. This connection does not necessarily make a deontologist out of Aristotle, or any other ancient Greek philosopher. It also does not necessarily imply a clear line of special philosophical interest or concern spanning three millennia. In contemporary times the idea of deontology has come to mean that there are right and wrong actions *in themselves* , as opposed to right or wrong by virtue of the consequences of the action for the good. As such, it is difficult to talk about deontology without talking about Utilitarianism. In addition, deontology has become associated with various Kantianisms such as the importance of following absolute rules or categorical imperatives, the integrity or autonomy of agents, and the importance of having respect for others. Some of these ideas, as we will see, are of great importance to natural law theory. But again this does not make natural law theory into a deontological theory or necessarily imply that natural law theory pays special heed to Kant. For natural law theory may be differentiated from deontology in many ways including, most importantly, on the basis of its focus on practical reason and the importance of the common good as a source of obligation.

We can, of course, differentiate between consequentialism and non-consequentialism as general theories about the criteria of moral obligation, or the rightness and wrongness of actions. Unfortunately, many writers in their discussions of these subjects sometimes fade inexplicably in and out of consequentialism and Utilitarianism. I will try not to do this. But it also suggests that we need to take some care and identify the extra, but non-essential baggage of consequentialism too.

I first want to distinguish between consequentialism the moral theory versus the evaluation of consequences as a feature of practical behavior. There is certainly truth in the idea that as human beings concerned with being practical we must examine the probable consequences of our decisions and actions and use this evaluation in the determination of future actions. In this very broad and morally uninteresting sense all of us are consequentialists. But consequentialism as a moral theory says that the determination of the rightness or wrongness of actions is determined exclusively by their ability to bring good into being. This means that the logic of consequentialism is exclusionary. It excludes the possibility of locating any other relevant moral principles other than 'do what promotes the good'. It follows that consequentialism holds an *instrumentalist* view of the relationship between actions and ends or goods. Actions are not right or wrong in themselves, but right or wrong on the basis of the kinds of results they have on the production of good. This means that the value of the action itself is to be understood in terms of its efficiency or instrumental capacity to promote good. This also suggests that consequentialism puts a premium on the *capacity to predict* the results of particular actions.Finally, if two actions are both predicted to bring good into being, consequentialism seems to countenance that the action producing the most good be chosen, and as such seems to qualify as a *maximizing* theory.

Now this last point may be controversial. But for the major consequentialism of the day, namely Utilitarianism, it is not. The question we must consider here is whether the general theory of consequentialism has a maximizing injunction. It is hard to see what other standard, if any at all, could be offered in the event that two actions produced unequal yet certain amounts of good. For the *sole* function of action is to bring good into existence. The only relevant difference between the actions seems to be the net good they produce. Doesn't this mean that one action is more efficient or has a better capacity to promote good than the other and that, indeed, this seems to be the point of viewing actions in instrumentalist terms in the first place? Doesn't this imply that we are interested here in the most efficient production of the most good?

Perhaps our answer rests on what exactly we mean by the good ? Is consequentialism as a general theory committed to the idea that there is a quality or attribute common and intrinsic to the variety of particular goods themselves sufficient to define the general good, or alternatively, common to the particular or individual efforts to achieve the good which is achieved or maximized by ensuring or respecting a common characteristic of individual efforts? In other words, is the general good to be understood as a product or a sum of particular goods, or as a sum of some feature of individual behavior with respect to particular goods? Given the instrumentalist view of the relationship between means and ends, is the latter interpretation plausible at all? Further, we must note that consequentialist theories differ profoundly with respect to the nature of the non-moral good to be achieved. For example, we might want to achieve absolute power of the ego, or maximal sexual utiles for all, or final atonement for transgressions against God, or everyone's first and last choice on their preference orders, or ever-increasing GNP or GDP, or many and varied other possibilities. We will see that the notion of a *general* good involves severe impracticalities however defined or applied.

In any case, either consequentialism as a general theory is maximizing or it is not. If it is the former, its plausibility depends importantly on making sense of the idea of general good. If it is the latter, its application to particular cases would seem to be confined to the careful identification of only two relevant characteristics of actions , either they would just barely promote good or they would just barely hinder the promotion of good. Here consequentialism seems limited as a practical theory for a variety of other reasons if it now becomes a *satisficing* theory. But if consequentialism only involves a satisficing imperative, the instrumentalist and predictive means it employs and its sole concern to produce good seem too elaborate in relation to this meager concern. Given the importance attached to instrumentalism and prediction and the production of good, it is hard to see why consequentialism generally does not qualify as a maximizing theory too.

Much of the controversy between consequentialism and non-consequentialism revolves around the meaning of the idea of *bringing good into existence* . Are we concerned with generalized *end-states* of affairs , or can activity itself, even *continuous* activity count as a good in consequentialist terms? Many a non-consequentialist critique of consequentialism argues that it must ignore or discount the moral relevance of especially agent-relative or centered *activity* . But more importantly for this dissertation, consequentialism and Utilitarianism, albeit for somewhat different reasons, both seem to discount the idea that *active and continuous participation in the goods of one's community* can itself be viewed as a good. I will approach this problem first by showing why in principle consequentialism has difficulty dealing with the concept of *activity* as a good and how this relates to the problem of understanding the idea of *general* good. Secondly, I will show briefly how it discounts agent-relative values. Finally, I will show how it discounts the good of participating meaningfully in one's community.

Now, in principle, the strength of consequentialism's insistence that the *sole* function and moral relevance of action depends on its results for the achievement of good seems to be a function of the *comprehensive* or general nature of the good achieved. The more interests satisfied by the principle of good, the more generally acceptable or appealing the principle ought to be. But, it seems that the more constituents allowed into the social or aggregate level of good, the less likely consequentialism will succeed as a practical theory concerned to maximize overall good. For the more we must count in as constitutive of the general good, the less likely there can be found a common measure of goodness upon which the determination of *maximum* social good depends.

Generalized end-states of affairs, like annual GDP or GNP, utilize a common measure of good, and therefore, in principle, are capable of aggregating or measuring good. But just such measures seem unlikely to account for the value of activity itself. More or less discrete goods, like widget starts or more efficient discombubulation processes, might be the focus of the evaluation or assessment of goodness. But at what *point* , during the actual or hypothetical particular *activity* or continuous activity of an individual who makes widgets or discombubulates for a living, would one plumb the depths of its goodness for purposes of calculating maximal good? Certainly there are no obvious consequentialist answers to this question. Again, the more constituents allowed into the notion of general good, the more plausible and acceptable are the ideas that the determination of the rightness and wrongness of actions can be understood as the *sole* function of consequences for the production of such good and that the principle of utility is the exclusive moral principle. But, there seems to be a commensurability problem in relation to particular goods, perhaps especially with the good of activity. In other words, the criteria necessary to achieve soundness for the *maximizing and generalizing* logic of consequentialism works against the criteria of soundness of its *exclusionary* logic, and the upshot of this renders consequentialism as a general ethical theory inconsistent.

In the discussion just above I have, of course, relied on rather crude measures of general good, though these are clearly associated with common forms of Utilitarianism, or at least associated with the thinking of many contemporary Utilitarian economists. Because crude measures of happiness seem to be in vogue, it is important to draw out their practical and moral consequences. I could have used examples of a non-Utilitarian consequentialism, but these are, often times, morally uninteresting. For what good purpose could be served through a discussion of say ethical egoism or hedonism?

So far we have seen some of the difficulties confronting consequentialism's idea that the moral relevancy of actions and activity can be captured in full through the achievement of general good. But we also saw difficulty in understanding the idea of *general* good itself. If the idea of general good does *not* require a maximizing, aggregative, or additive process and a correlative standard of measurement applicable across and through different kinds of particular goods, it at least implies the view that the collection of particular goods can be sensibly referred to as a *single* object. In this case, the idea of a general good refers to the aggregate of particular goods or the total mass of all things desired as good, albeit lacking in any common, measurable, intrinsic attribute. What particular goods really *have* in common with each other is the attribute of being desired or preferred as goods, rather than a commensurable quality of intrinsic goodness, and the collection of these goods assumes the title of the general good. Now this seems to be what classical Utilitarians, like Bentham, had in mind, except that he thought that desire itself could be objectively measured in terms of utiles. Since it cannot be, some contemporary Utilitarians have opted for ideas equating the honoring of preferences or preference-orders with the production of good. The problem with this formulation is the difficulty in understanding how the general good results from say, the conflict between my desire to retail hard core pornography throughout Canada and the desire of women for physical and psychological security not to mention for respect. In any case, these last few points suggest that the general good *itself* cannot be desired, and therefore, that it cannot be understood well as *the* object of any particular action. This seems to render the consequentialist injunction "strive to achieve the overall best consequences in terms of general or social good" nonsensical.

Even if we allow that particular actions might be said to promote the general good through the production of particular goods, the relationship between particular actions and the general good seems entirely remote, and morally and practically innocuous. One important reason why this idea is innocuous is because there is no obvious derivative relationship between general good and particular intentions, commitments, projects, and actions of individuals. Either as a motivating or a justificatory reason, the general good seems insignificant in relation to what particular individuals think and do about their *own* moral undertakings. Finally, given the lack of any solid rule of commensurability between particular goods or particular desires, the promotion of general good seems entirely remote from particular purposes and projects. It is just not obvious, for example, that the most important reason why an individual devotes his life of though, care, and action to the causes of Amnesty International or the Green Party is or ought to be the production of general good or happiness. If there is a sense in which the general good is served or facilitated by such actions it is most indirect at best, and misleading with respect to the complexity of the relationship between the commitments, intentions, actions, and ends of individuals.

So two important differences between consequentialism and non-consequentialism surface. First, the former, given the complications of its various logics must *at some point* discount the idea that an individual's activity directed at achievement of the general good may have independent moral value. It is too difficult to square the idea that such activity itself can have independent value as a particular good with the idea that the general good is a thing which can be aggregated or totaled up. Second, the idea of *general* good seems vague and impractical in connection with particular actions and projects. John Finnis nicely summarizes the case against consequentialism. [10] These points include:1) No plausible sense can be given to the ideas of "greatest net good" or the "balance of good over bad"; 2) No sense can be given to the notion of maximizing good; 3) No consequentialist reasons or justifications exist for preferring altruism over egoism; 4) No principle of justice exists which is necessary in the event that we do decide to adopt a non-egoistic form of consequentialism; 5) No way of determining proper actions exists in the context of possibly "innumerable" opportunities and courses of action. Other important criticisms of consequentialism are that it provides no way of choosing between courses of actions with equal utilities and/or disutilities attached, and in the case of universal consequentialism, it excessively inflates the sphere of personal responsibility through its tendency to effectively run together what one can do with what one ought to do.[11]

When we refer to the possibility that activity may have independent moral value, of what sort of value are we speaking? In order to answer this question we must consider the second and third points of argument referred to above. We must consider especially: 1) that activity the importance of which arises from its connection to the individual agent's own moral commitments and projects; 2) that activity the importance of which is connected to the moral relationship between the individual and her community. It is important to see how these values stand up against consequentialism generally, and against Utilitarianism in particular.

Let us first consider the relationship between the two values above and consequentialism generally. Consequentialism cannot be said to take the notion of personal commitment seriously, that is, take the value that commitment itself has for the individual agent as something often requiring respect from others, except in a limited, obvious, and quite indirect sense. This might be said to occur where there is a *coincidence* between personal commitment and the particular good which is simultaneously the object of personal commitment and a constituent of the general or social good. There is no theoretic-requirement to respect commitment levels in any case. According to consequentialism, the moral value of an *action* derives from its instrumental relationship to the particular or general good(s) involved. So, consequentialism must take actions to be discrete things and without any relevant intrinsic features of their own. Even if we could somehow calculate the worth of requiring and receiving respect for commitment, and the associated values of having a clear conscience, self-respect, good intention, and personal involvement, it would be strange to say that such goods are *only* important because they are promotional of other particular and general goods. Consequentialism, in principle, seems incapable of saying that commitment, conscience, self-respect, and good intention as constituents of moral activity are worthwhile achievements *in themselves* since it seems silly to talk about aggregating commitment levels etc.

Let us consider the second point above. What is the view of the relationship between the individual and other individuals, community, or society from the standpoint of consequentialism? We can infer part of an answer to this question from the main features of consequentialism. But if we desire fuller treatment of this question, we must consider particular consequentialisms like Utilitarianism. Now from the fact that consequentialism narrows relevant moral principles down to one, that is, "do what promotes the good", and understands particular actions in terms of instrumental value, and so assumes a capacity to predict results, we can say that it is a *rationalist* moral theory. In other words, it understands moral behavior as the possibility and product of a rational capacity, defined primarily in terms of the ability to select the most efficient means toward ends. Consequentialism also seems to encourage a perhaps frenzied life of action in pursuit of general good, or at least focus on the importance of taking action to a greater degree than other moral theories given the *imperative* to promote the general good. Alternatively, another moral theory might focus on the importance of just *being* friendly or respectful. Further, while consequentialisms which define a general or social good can be said to take account of the relationship between the individual and her society or community in the sense that individual actions ought to promote the wider good, these forms tend also to isolate individuals from important social and communitarian relationships. Along with this tendency we can observe another one, the tendency to neglect the importance of social and moral learning based on, for example, the cultivation of natural sentiments and inclinations, and the promotion and maintenance of organic ties to one's community.

Consequentialism, as a general theory, does not have anything to say about the importance of maintaining an individual's communal or social relationships. In the case of some formulations of Utilitarianism, the only relationship the individual has with society is as an entity at one level *abstracted* from social relationships and charged with bringing about general good through one's capacity to predict and secure efficient results of one's actions for this good. Moral behavior and action is understood as the product of applying the injunction to promote general good and involves efficient calculation toward this end. In the Utilitarianism of Smith, for example, individuals are not even required to think clearly about the nature of the common, social, or general good, for this good results happily from the pursuit of self interest. This is a bare and oversimplified notion of agency and moral action and good since it ignores the moral relevance of the social context. For example, it does not seem to consider that an individual's own good may be realized through, in, and by her relationships with others. Further, it does not take account of the moral relevance of some of the defining features of these relationships, such as trust, caring, honesty, respect, friendship, and mutual involvement. As such, consequentialism may ignore important *sources* of moral behavior, sources important to tap into if principles and rules are to be respectfully and effectively applied and followed in the first place.

What does Utilitarianism in particular have to say about the importance of an agents' own commitments and moral projects? Consider the case of Emily, a committed anti-abortion advocate. She is also a surgical nurse in a rural hospital who often finds herself, against her will, assisting in abortion procedures. She sometimes glimpses live fetuses in what appears to be pain and distress, and due to her occupation and the limited number of available surgical nurses, is pressured in to disposing/killing them. She thinks that it is just wrong to kill innocent human life and that this is so apart from any arguments suggesting that life is sacred or divinely-sanctioned. Within the specific context of Utilitarianism, I think it is clear that *unless* these live fetuses had achieved sufficiently developed central nervous systems and so the status of persons, assuming that this point can be adequately determined, Utilitarianism must discount Emily's feelings and thoughts on this subject to a very large degree. For her own feelings and thoughts on this matter seem to be *irrational*. They are too remote and otherwise disconnected from the production of good, defined here in terms of say, relieving pregnant persons of unwanted responsibilities or the saving of social and economic costs associated with having fewer unwanted children around.

According to Bernard Williams, the sort of situation described above constitutes an attack on the individual agent's "integrity". He writes that: "It is to alienate him in a real sense from his actions and the source of his action in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which *his* actions and *his* decisions have to been as the actions and decisions which flow from the projects and attitudes with which he is most closely identified." [emphasis in original] [12] Put another way, consequentialism and Utilitarianism pit the agent against herself and resolve the conflict in favor of the "agent-neutral [objective good]" rather than the "agent-relative [subjective claims arising from the agent's projects or from those of other agents]" values involved. [13] When agents are pressured into situations like that of Emily above, they find themselves, according to Thomas Nagel, up against "the phenomenological nerve of deontological constraints. What feels particularly wrong about doing evil intentionally even that good may come of it is the headlong striving against value that is internal to one's aim." [14]

How does Utilitarianism view the relationship between the individual and society? No doubt Utilitarianism tucks the individual back into the concrete fold of society in a way that consequentialism as a general theory seems incapable of doing. For according to the most important and morally interesting interpretation of Utilitarianism, social relationships are defined in terms of benefactors and beneficiaries and good is universal. At the same time, because Utilitarianism is a consequentialism, the understanding of moral behavior continues to be based rather narrowly on the individual and his capacity to select appropriate means toward the good. Utilitarianism still views the individual as a rational calculator, one who adopts the most efficient means or the best action promotional of greatest happiness defined in terms of general good or social utility or the highest degree of satisfaction of the desires, preferences, or interests of society. But what kind of relationship is that between benefactor and beneficiary? First of all, it seems rather narrow as a moral vision of social and interpersonal relationships to define human relationships exclusively in these terms, and it seems in many ways uninspiring. For in practice, it need not, but often reduces to a relationship of *dependence* of the beneficiary upon the high-minded, altruistic, well-endowed benefactor. As such it lacks a variety of attributes important to relationships and to the achievement of social good such as again, trust, care, honesty, respect, sharing, equality, and mutuality.

Let us summarize the main features of the non-consequentialist approach under discussion. This approach is not concerned to identify and achieve senses of either the general or the greatest good. The approach favored here, involves a comprehensive schedule of basic goods. Further, the emphasis is placed on participation in such goods not on the production and enjoyment of states of affairs. There is no maximizing imperative attached to the achievement of goods. Instead reasonable levels of development and achievement of ends are sought. Non-consequentialism does not adopt particular means based on a calculation of their efficiency with respect to the promotion of ends. Morally relevant human relationships are not restricted to those of benefactors and beneficiaries.

Now natural law theory assumes a clear non-consequentialist ethical approach to the relationship between intention, action, and object. There are three major points to consider here. First, unlike consequentialism, natural law theory does not abstract the individual out of his social and interpersonal relationships for the purposes of assessing interests and obligations. Rather, it assumes the importance of integrating individuals and individuality together with community, that is, with communities strongly but not exclusively held together on the basis of the wide recognition and appeal of common good, and defines obligations within this context. Second, natural law theory does not conceive of individuals as essentially or most importantly calculators of the most efficient relationship between means and ends or goods. Instead, natural law theory puts forward a more complex view of the nature of moral being and action, one which takes account of the moral relevancy of intentions, commitments, conscience, responsibility, autonomy, mutuality, and respect. Third, natural law rejects the relevancy of the idea of *general* good, replacing it with the idea of a *schedule of equal and irreducible* basic goods.

Rejection of the Social Fact Thesis

As we have seen, legal positivists identify rule-determining, interpreting, applying, enforcing, and following behavior in terms of social facts. Such facts do not and cannot contain any moral content, and in any case, cannot be the subject of moral argument. If laws were understood as having moral sources or content, this would upset the sufficiency of the notion of legal justification, and contradict the version of the separation thesis which follows from the "strong" social fact thesis. This is in fact what legal positivists actually claim regardless of the points made by Lyons that at some general and abstract level the "social conception of law" need not imply that law has no "positive moral value". [15] In any case, even if legal positivists all agreed that there was a necessary connection between law and morality on the basis of conventional or positive beliefs about the latter, this would not satisfy the requirements of natural law theory. As I have argued it, the criteria of validity and the conditions of existence constitute an *exclusionary* logic. When judges use these criteria to determine and justify the application of particular laws, the logic steals away the independent force of any moral principles which are allegedly being referred to. While many legal positivists seem to have moral concerns, and recognize a need for and the legitimacy of moral criticism of the law, they leave no effective or meaningful "room" for such criticism since there is no theoretic-requirement or place for it. [16]

While natural law theorists are not going to insist that it makes no sense to identify and apply the law on the basis of some non-moral, social facts, they cannot require that these functions should operate solely on the basis of such facts. Specifically, natural law theory can accept the idea that at least some non-moral facts, sources, or conventional practices determine the existence of laws, but it cannot accept the idea that the citation of reasons explaining the institutional progeny behind a particular law is adequate for justifying the application or enforcement of it, nor can they accept the idea that there is no necessary moral content in law. This, of course, shows natural law theory to be an untidy theory since it immediately legitimates and necessitates questioning the substantive relationship between law and morality. For we must now establish the authority and legitimacy of *legal* systems partly through *moral* justification.

At the same time, we must address in a serious way: 1) the point where or the reasons why some unjust or immoral laws might be considered acceptable or legitimate because of the justice of the legal system as a whole; 2) the point where or the reasons why the legal system as a whole no longer carries sufficient justificatory weight because of the disproportionate evil associated with some particular unjust laws. Legal positivism relegates all of these concerns to ethics. But it does this in a rather weakly defended and impractical way, as it accepts the sufficiency of the social fact thesis with respect to the justification of legal decision-making. As such, legal positivism seems to grant valid decisions in law *ante facto* justificatory force in the legal sense ahead of any serious effort to determine the need for any relevant moral justification.

There is then a profound disagreement between legal positivism and natural law theory about the nature of the *facts* deemed relevant for the identification and justification of law. Natural law theorists need not say that the legal positivistic sense of judicial acceptance and usage of laws, and the notion of enactment in proper or valid form, and the idea of general conformity to law do not constitute relevant social facts. But they must disagree with legal positivists about the relationship between such facts and the idea of justification in law.

Unless, as I have already pointed out, legal positivists and especially Raz better defend the "strong" social fact thesis in terms of the purposes of legal systems and moral justification, the appropriation of "all interpretive sources" as "social", and *not* moral, must be understood as an arbitrary and purely stipulative move. Legal positivists need to show why the strong social thesis yields better results than the weak one which, as Raz argues, allows occasional unmediated resort to recognizable *moral* sources, and therefore, to the occasional, but still not necessary infusion of moral content into law, or they need to show why the latter practice causes unacceptable results.

In cases where no legal precedent exists or where legal precedents conflict there does not seem to be any good reason for stipulating that judicial consideration of moral principles somehow does not necessarily involve official use of *moral* sources to determine the law and therefore, the necessary incorporation of moral content into the law. Everyone agrees that hard cases exist, and therefore, that moral principles are referred to in *some* way. The disagreement concerns how to interpret the reference to these principles as legal or moral sources. The "strong" social thesis is required in order to *close* the logic of legal validity and secure the sense of legal justification. But sound practical and moral reasons for doing this seem lacking. It can also be argued that features of the rule of law help to determine other particular laws, and can be shown either to hold or influence moral content in the law, and therefore, constitute other *moral* sources of law. Finally, in so far as legal systems necessarily serve human needs identifiable through the logic of ethical naturalism and their associated principles function to identify other particular laws, still other *moral* sources of law may be located.

Finnis captures well the general critical intent of natural law theory when he writes that "the concern of the tradition...has been to show that the act of 'positing' law (whether judicially, legislatively, or otherwise) is an act which can and should be guided by 'moral' principles and rules...What truly characterizes the tradition is that it is not content merely to observe the historical or sociological fact that 'morality' thus affects 'law', but instead seeks to determine what the requirements of practical reasonableness really are, so as to afford a rational basis for the activities of legislators, judges, and citizens." [17] I account for this "critical intent" in my discussions of the *integrity of law* .

Rejection of the Separation Thesis

As we have seen, legal positivism only rejects certain versions of the separation thesis. It rejects those which damage the independence of the social fact thesis. According to legal positivism, the latter must be viewed as sufficient with respect to 1) the identification of laws; 2) the application and enforcement of such laws by judges; 3) the related ability of the criteria of validity to supply justificatory reasons to officials with respect to the application and enforcement of laws. My contention is that natural law theory cannot accept the social fact thesis with its implications for the justification of the application of the law. Nor can it accept its implications for the version of the separation thesis which denies necessary moral content in law or necessary moral sources of law.

Certain alleged versions of the necessary connection between law and morality do not damage the social fact thesis because they let stand ideas about the non-moral, socially-sourced determination of law, and the sufficiency of legal justification as a product of these sources. Raz shows this allows for necessary connections between law and morality *outside* of the tasks of officially identifying laws and justifying their application or enforcement.[18] For example, we might let stand the social fact thesis but understand legal and moral obligations as sometimes requiring essentially the same thing. But this might require us to disjoin the identification of a legal *rule* from the identification of a legal *obligation* . In any case, Raz has suggested that legal and moral obligations might mean the same thing because both normally entail sacrifice of important interests, therefore, such requirements must be morally justified.

Yet the only obvious justificatory reasons offered by legal positivism as generally available to citizens are the value of the state of social order achieved or perhaps the value of the criteria of validity. So, when citizens are confronted with legal obligations determined by judges, presumably already justifiable in the eyes of the latter according to the social fact thesis, citizens may either accept or reject the achievement of either of these ideas as the reason for why they ought to conform to the obligation. However, this conclusion seems problematic for at least five reasons: 1) It is not obvious that *any* order is better than none at all, 2) It is not obvious that there has ever been or could ever be a pure state of human disorder if by this we mean an absence of *any* regularity and certainty; 3) It seems unlikely that anyone would seriously take the achievement and observation of a system of logic or some criteria of validity *for its own sake* as a satisfactory reason for observing any of the rules constituting the system; 4) It is obvious that the relationship between conformity to law and the production of order, certainty, or stability varies according to the *particular* law in question; 5) These understandings of justification unduly separate the activities of officials from those of citizens.

In what sense might the achievement of the social order envisioned by Hart establish a necessary connection between law and morality and constitute a moral reason for obeying law? We can see that because human societies are not, as Hart less than nobly notes, "suicide club[s]" [19] since "dominant group[s]" [20] benefit in terms of achieving basic security for themselves, it seems arguable that there is a necessary connection between law and at least some aspect of the *positive* morality of particular societies. But Hart himself smartly does not argue this. He does argue that given certain basic "truisms"which constitute "the setting of natural facts and aims", legal systems cannot have just any content but must provide sanctions securing some basic goods for some members of society. [21]

But this interpretation of an alleged connection between law and morality is problematic since it is not obvious that either law or morality are referred to when contingent human facts are accounted for. First of all, the connection is not one of logical necessity but of "natural necessity". The significance for morality is weakened, on the one hand, by Hart's view about the *contingent* status of basic human needs. [22] If human nature might have been and may one day be different, the "natural necessity" of the sanctions employed to secure basic needs is situationalized or itself conditioned on changing factors. So, even with respect to the most basic needs, there is no objective, unchanging ground for morality. But, more importantly we need to look closely at the alleged relationship between law and morality in the context of Hart's discussion of basic goods. That some dominant, but not necessarily numerically dominant, group finds its basic needs secured is obviously a function of power not law. So a fact about power forces and accounts for the presence of certain related sanctions. That dominant groups always benefit over others in their society is *not* a necessary feature of law, but more accurately, a necessary feature of the way in which humans use power in social systems employing coercive sanctions. Hart, of course, does not define law solely in terms of a coercive social system, but also and distinctly he thinks, in terms of the criteria of validity which does not independently establish any necessary connections between law and morality. So, in the end, it seems that the truisms Hart considers are actually of much less than "vital importance for the understanding of law and morals" as Hart claims. [23] As set out by Hart, I do not think they enhance our understanding of the relationship between law and morality at all.

Raz and Hart seem to imply that citizens themselves might take certain features of the criteria of validity, for example, the rule of recognition as a reason for their conformity to a particular law, or perhaps take a judge's presumably convincing display of moral commitment as a reason for conformity. [24] But the first possibility fails because the existence of a rule identifying the ruler(s) does not suffice as sound justification or a sufficient reason for doing what the ruler(s) says. Likewise, the second possibility fails unless we have reference to the *object* of moral commitment, and perhaps to the *integrity* of the commitment itself. But we cannot locate the former since the object here seems to be a rule identifying the ruler(s), and the latter might very well be absent. Interestingly, Hart himself rejects Raz's position on the similarity between legal and moral obligations "[s]mall as this moral component is", because it forces Raz into requiring that judges "pretend" to believe that their decisions and actions are morally justified according to the basic rules of recognition.and thus constitutes an implausible account of what judges actually do .[25] More importantly, I would suggest, is the idea that judges simply should not do this.

Natural law theory as I understand it, must argue for necessary or unavoidable connections with regard to the determination of law itself. Thus it argues for necessary moral content in law. There are a number of possible ways in which we can understand the determination of law to be at least partially dependent on moral sources. The presence of moral sources of law, therefore, need not imply that *every* single particular law is just or morally right or secures some idea of good. We are, as suggested above , accepting a certain untidiness in the determination of law. But this is justifiable on many levels and for many reasons including, more accurate reflection of the complexity of moral reality, more serious-minded attention to the long-term maintenance of the integrity of the legal system, as well as the more certain achievement of substantive justice and moral principles.

So, taking the general framework of natural law theory as an analytical and evaluative device implies that there will be some untidiness with respect to the balance between unjust particular laws and the justice of the system as a whole. This suggests that particular natural law theories will be more or less conservative or radical with respect to this balance. Some will argue for the presumptiveness of the system as a whole, as I think Finnis does, others will suggest more or less clearly, as for example Rousseau does, the potential criteria for civil disobedience or even the grounds for revolution. Natural law theory then accepts the idea that law may itself be understood and used as an instrument of social and moral change. But this idea is exaggerated if thought to imply a strong step in the direction of disrespect, disorder, anarchy, and violent social unrest. Indeed, as Drury explains, encouraging recognition and use of law as a legitimate instrument of change can be justified against the alternative of "an age where terrorism is the most common mode of political change." [26] Drury's observations also suggest why it is important to encourage generalized respect for the law, that is, for one of the main features of the *integrity of law* .

I think there are two common ways in which natural law theories define the pertinent sense of the necessary connection between law and morality we have been examining. Genuinely *moral* sources of law may be found in: 1) certain features of the rule of law; 2) the principles which identify substantive moral ends or purposes of a society based upon naturalistic foundations. Most importantly, points one and two supply much more weighty justificatory reasons to all members of a legal system than the ones offered by legal positivists and discussed in the several paragraphs just above. The continuing discussion is best undertaken in the context of specific natural law theories and the detailed development of the concept of the *integrity of law* to come. It is to the former task that we now turn.

Chapter Six

The foundational structure of natural law has been described above. As a general theory of law, natural law theory has the following fundamental features: 1) in dealing with epistemological and meta-ethical questions about the nature of good it employs an ethical naturalist approach; 2) it incorporates a non-consequentialist approach to the question of moral being and action; 3) it rejects the social fact thesis by counting certain moral facts as relevant to the determination of law, and rejects the sufficiency of non-moral social facts with respect to the justification of law in favor of moral justification; 4) it rejects the separation thesis and substitutes a unity-of-law-and-morality thesis on conceptual, procedural, or substantive considerations implying a necessary connection between the content of law and morality. This follows on the basis of the relationship between legal and moral reasoning and justification, or given the status of the rule of law, or the existence of natural sources or determinants of law pointing toward the existence of basic goods which direct us toward relevant moral principles.

In the discussion below, I examine several theorists who either argue in support of some of these features, or who are *full-fledged* natural law theorists in the sense that they presuppose or argue for all the features above in a full or comprehensive fashion. I classify these theorists as either conceptual, procedural, or substantive natural law theorists. Conceptualists focus on the meaning of general ideas or concepts like obligation and justification in relation to the two main theses of legal positivism. In other words, these theorists take up or assume the meta- ethical task involving exploration of the meaning of obligation and justification. Proceduralists analyze the centrality of the rule of law as a relevant moral feature. Substantivists explore the connection between moral purposes or principles and law and their implications for the social fact and separation theses. Substantive theories, like that of Finnis', are full-fledged in the sense that they identify and argue for the importance of incorporating specific moral content in law. At the same time, the relationship between law and morality they develop presupposes the strength of arguments made by proceduralists like Fuller, and conceptualists like Detmold. Briefly, the set of basic goods Finnis argues for is facilitated in part by the rule of law and the rule of law presupposes a way of thinking about basic concepts like justification and obligation.

The differences between these three theories, or perhaps better, levels of theory, concern the *objects* of analysis or inquiry. When I speak of conceptual theories or of conceptualists I do not mean to call forth the old philosophical dispute between realists and nominalists. At the same time, I suppose one cannot here avoid at least implying views about the ontological status of ideas in general. One need not be a realist or one who understands mental constructs to exist *independently*. One cannot be a nominalist construing concepts as *names* only. One must take certain concepts, especially those shared by law and morality, seriously in the sense that they are conceived of as objects important in legal and moral *reasoning*. A concept need not be said to enjoy separate ontological status *as* a mental construct. We must, however, be able to see that concepts like justification and obligation deserve philosophical treatment because of their *practical* connections to law and morality. Even if such concepts in their relationships with law could be viewed in strictly logical and formal terms, they should not be.

When we shift analysis to the procedural level, we are concerned with the *manner* in which decisions and actions are undertaken within a practice. With respect to legal practice, at a minimum, rules governing actions must be stated clearly and followed consistently. It is also crucial to develop certain relationships between those who apply the rules and those who follow them. At a minimum, these relationships entail the sort as between superiors and subordinates. Beyond this, it may or may not be important to develop *special* relationships between these parties. Whether or not special relationships are required depends upon one or a combination of the following factors: 1) the kind of practice which itself depends upon the functions or purposes of the practice; 2) the relationships between the practice in question and related practices; 3) the existence or not of shared functions or responsibilities between superiors and subordinates within a practice. As we will see, these points apply strongly to the relationship between law and morality. Further, because of the above three qualifications, it is very clear and important to note that the *manner* in which the rules are applied can range from poor to excellent. More than anything else, this range exists because the functioning or the achievement of the purposes of a practice itself ranges from some acceptable minimum to some maximum. For the same reasons, it is also quite clear why there is overlap between conceptual and procedural levels. For many of the questions encountered at the former level crop up again at the latter level because of the roles and the responsibilities attaching to the positions of superiors and subordinates and other constituents.

At the substantive level we are most concerned with the purposes of the practice or the ends served by it. Obviously, given the three points above, there also may, but need not be, close relationships between substantive and procedural levels. In other words, the application of the rules may or may not be logically distinct from the purposes of a practice. The rules and the way in which they are applied may serve only instrumentally as *means* to ends or may partially constitute ends themselves.

The discussion above can be illustrated through example. Consider the game of baseball. At a conceptual level the notion of *umpiring* is crucial to playing the game and involves a very weak kind of justification, and a strong sense of obligation. The form of justification, if indeed it is one, used by umpires is weak because it entails little more than a pointing gesture to a settled book of rules. But obligations are strong, if one wants to play the game, one simply must follow the rules all of which are settled and accepted. Players are strongly obligated to follow the rules because of the combination of the following reasons: 1) the historically settled nature of the rules; 2) their general acceptance; 3) their arguably consensual nature; 4) the general view about the importance of playing the game itself. Umpires are obligated to apply the rules because that is the nature of the role they have agreed to perform.

The notion of umpiring is common across many games whose purposes are very similar and often identical. Umpires apply rules ensuring right or correct *play* or perhaps gaming. At least in principle, umpires in baseball cannot make any controversial rulings or applications of rules. Umpires simply ensure or observe that the rules are followed. The reason why controversy about umpiring is at least in principle non-existent is because playing time, and the various zones and fields of play are *precisely* demarcated. For example, strikes are either in or out of the strike zone and hits are either in or out of the field of play and a runner's foot is either on or off of the base. Of course, something of Zeno's paradox enters into the game when balls are hit *onto* the foul line or pitches are thrown *onto* the border of the strike zone. But even here, in principle, a correct and quite *factual* ruling can be made so long as observations are accurate. The controversy enters into the game because the traditional measures used to determine close calls are not precise. There would be far less controversy in the game if we allowed cameras, electric eyes, and computers and their keepers to apply, so to speak, the rules of baseball.

Now the relationship between umpires and players is strictly one of superiors to subordinates. The strictness of this relationship is a function of the strictness or narrowness or perhaps the singularity of the game itself. This means that significant roles or responsibilities between umpires and players are not shared and few, if any, side-games, or games within games, or private pursuits are played by the participants during the game of baseball itself. Players may make side-bets with each other or gain lucrative advertising contracts, but none of these activities are importantly related to or directly facilitated by the rules of baseball.

The rules of baseball directly facilitate the playing of the game, that is, the development of the relevant skills and the enjoyment of the game, in short, the purposes of the game. We might even say that the rules facilitate the purpose of the production of *professional* baseball, that is, baseball presumably of the highest quality, baseball, most enjoyable to observe because played by those most highly skilled. There is an instrumental relationship between the rules and the purposes of baseball. The rules structure the *play* of the game in a way which allows for its enjoyment and development. Just as the commercialization of baseball cannot be understood as significantly promoting good baseball, the rules cannot be understood as directly promoting commercialization.

With regard to baseball, then, at a conceptual level we focus on the meaning and practical implications of the general concepts of umpiring, justification, and obligation common to the successful operation of the game. At a procedural level, we focus on the particular way in which the rules are applied. At a substantive level, we focus on the purposes of the game and the relationship between these purposes and the rules. Since neither law nor morality constitute games, it should be clear that the sorts of relatively tidy observations and applications of these levels to baseball cannot be made in the cases of law, morality, and the relationship between them. Still these three levels of analysis are useful in understanding theories and practices of law and morality too. To this endeavor we now turn.

Conceptual Theories

M.J. Detmold argues that the basic features defining moral thought are regularly and genuinely employed by judges, lawyers, and citizens as they interpret, weigh decisions in, apply, enforce, and follow the law. Because of this, an acceptable theory of law must account for such practice and define law accordingly. Legal positivism insists through the social fact thesis upon detaching moral thinking from legal thinking. Further, it suggests that the latter constitutes that which is essential to what judges do, and sufficient in terms of the justificatory requirements attaching to decisions in law.

In order to simplify and understand better Detmold's dense but very rich analysis in The Unity of Law and Morality, we must review and expound upon his examination of the kinds of "weight" , decisional force , or justificatory power attaching to principles, reasons, and rules. Legal positivists describe judicial decision making in terms of *rule-based judgement*. What is controversial about this in legal theory and the philosophy of law is the weight they attribute to this activity. Generally-speaking, such judgement involves the identification of a rule usually through use of a rule of recognition, the identification of the relevant facts of a particular case as these relate to this legal pedigree, and final application or rejection of the rule respecting the case. The weight of rules found applying to particular cases is in practice taken to be absolute. Such is the nature of rules and rule-based judgement. They put an end to further consideration and discussion of the matter and matters like it. As far as the law is concerned *justificatory* requirements are complete.

This process differentiates rule-based judgement from *principle-based judgement*. The latter form of decision-making is open-ended and agent-centered in a way that rule-based judgement cannot be. Agents consider *competing* principles or reasons with a view toward making decisions consistent with their understanding of the *moral* importance of these principles and so provide moral justification for a decision respecting a case. This is opposed to trying to identify more or less logical relationships between rules of varying degrees of generality with a view toward finding one which *fits* the particular case, and therefore, facilitates a decision with respect to the case. The rational, moral, and passionate work injected into and consumed by the process of sorting through, pondering over, and deciding upon contesting principles yields and adjusts the weight of principles, and helps to justify final selection of one of them. But the decisive *principle* itself facilitates justification of the decision in the case by helping to show why it is important for the particular individuals involved to take or not take some action. Let us look more closely at these forms of judgement. Consider the following example of principle-based judgement:

A Everyone should follow the leader.
B The leader jumped off the bridge.
C Therefore, everyone should jump off the bridge.

Suppose that A is a *principle* under consideration by an agent. B is a fact. C is the logical conclusion of taking A in the end as a binding principle. In what sense is doing C justified? Clearly, this is justified if A is justified. An agent might now consider competing background principles such as: Knowledge is good and the leader knows best versus the idea that no one knows everything. In the end or perhaps at the new beginning, and under a fundamentally principled commitment to higher knowledge, the agent decides that he and we should jump following the leader's awkward descent to more lofty heights. Now suppose the following legal problem:

A Everyone must follow the leader who is a member of the Majority party.
B The leader authorizes tethering of some individuals - all of the Minority party - to a treadmill to create power for the regime.
C Therefore, the minority individuals must perform their legal obligation and submit to the tethering.

Here, A is a legal *rule* . B continues as a factual premise. C is the logical consequence of taking A as *the* appropriate covering or general rule, and relating and verifying B under the rule. Now the ontological status of A as a rule is different from A as a principle. The existence of A as a rule, depends on its factual status as something laid down by an institution, or another rule, or maybe by the leader herself. The existence of A as a principle depends upon the also factual rational, mutual, and passionate recognition by agents as they consider what they and others as individuals should do in particular circumstances. But the fact that A *is* a rule, cannot justify *following* the rule. Again, *doing* C must be justified by subject matter existing *outside* of the strict logical relationship formed by the conjunction of A-B-C. In rule-based reasoning, the *application* of C is justified when A is connected up with a rule of recognition (R). This establishes the validity of A and C. But according to the criteria of validity, (R) too, is a *fact* which presumably rests upon another rule (R_{-1}) and so on.

The dilemma posed by these two kinds of reasoning ought to be clear. Legal positivists insist on the disjunction of reasons for identifying and applying rules from the reasons for following them. But in practice, the two sets of reasons cannot be fully disjoined. For in practice, a judge's use of the criteria of validity as a reason for applying the law implies the importance of following the law. All along from C...R_{-1}..., the importance of following *existing* valid rules is being assumed. But, as we saw above, this expectation is not well grounded if such reasons are the only ones offered to subjects for following the law.

As we have seen, rules imply obligations and obligations either imply that those officials who identify and apply them think of them as binding on others according to Hart, or that those who have such obligations applied to them have or should have available to them reasons or justifications or at least pretentious displays of these for conforming to obligations according to Raz. Both agree that the criteria of validity and the conditions of the existence of law justify a *judge's* determination and application of a legal obligation. So, when Judge Surehand says to the defendant and mother "You must pay $250,000 in compensatory damages for harming this 3 week old acephalic infant when you chose not to have an abortion", it implies that certain normative consequences are expected. The defendant ought to pay up because the law is valid and says so, and in any case, ought to pay up in order to avoid further punishment.

But our defendant also must have or be presented with justificatory reasons why her conformity is important and the facts of the existence of more general rules or prudential behavior will not do. Whatever the source of these justificatory reasons, it seems even from the standpoint of efficiency alone, that judges must take their importance seriously, that is without pretension toward them, in order to facilitate the *generalized* taking of law seriously, and to avoid breakdown of the system. These ideas have implications for the social fact thesis. For they weaken the claim made by legal positivists that the criteria of validity and the conditions of law are sufficient with respect to the justification of legal decisions.

Now Detmold centers his sharp analytical skills on the nature of reasoning common to law and morality especially as it relates to justification and obligation and on this basis I classify him as a conceptual natural law theorist. At the same time, he recognizes the importance of the rule of law when discussing the roles and responsibilities of judges. [1] At other times, his discussion seems to suggest ethical naturalist and non-consequentialist features, for example, when he discusses the primacy of individuals or "particulars" and facts about them for practical judgement and moral values like "life, liberty, and property", and considering his clear acceptance of a wide range and practice of rational and moral activity. [2] But, by and large, Detmold avoids discussion of substantive moral principles. What he shows is a basic tension between the legal positivist view of legal and moral justification on the one hand, and the logical implications and practical effects of legal decision making on the other hand. The difficulties posed by this tension establish "the unity of moral thought" and its *necessary* operation in the field of law. Detmold argues that legal decision making involves moral bindingness, moral justification, and moral commitment. [3]

As we know, the separation thesis entails that there can be no necessary moral content in the law. The social fact thesis entails that non-moral social sources are sufficient to identify laws and stand as reasons for their application. At the same time, as we saw in the third chapter, legal positivists recognize the importance of moral criticism and justification of the law once laws have been identified by their social sources. But this implies that the criteria of validity do not constitute the final word on the justification of law in contradiction to our understanding of the nature of a legal reasoning and rules. Now as we know, legal positivism can save itself here only if it makes sense to separate what judges do from what citizens do with respect to questions about obligations and justifications. But the practical difficulties involved make this implausible. By examining the implications of very serious cases, we will see clearly how legal positivism ignores the practical and social and moral context of law and legal practice, and the way in which strong justificatory efforts are inextricably linked to this context.

If, for the sake of argument, we take legal justification and moral justification to be different forms of justification, then as Detmold points out, a judge's decision to sentence seems to produce a "*prima facie* sentence" [emphasis in the original] [4] at least for the convicted. But now judges and others, up and down the lines of authority, might find themselves faced with a dilemma concerning conflict between their official duties and, on the other hand, their recognition of relevant moral principles and of the fact of society's general acceptance of the legitimacy of moral criticism. By exploring further the consequences of the social fact and separation theses, we will see that this leads us full circle back to criticism of the legal positivist assumption that judges' legal decisions need not be morally justified.

What are individuals to do when faced with the apparent conclusion that: "The prisoner ought to hang, but it is not the case (morally) that the prisoner ought to hang." [5] Evidently, this is not understood as a contradiction by legal positivism. But especially in the case of capital sentencing, someone, somewhere, must assume moral responsibility for legal or authoritative actions, and thus must be able to justify morally the carrying out of the sentence since directives to functionaries of the state to kill one of its citizens are as final, binding, and conclusive as might be imagined.

Moral bindingness is assumed as part of the internal point of view. Interestingly, Hart does not seem to take it as so. Detmold argues that Hart's view of internality on this point is "substantially misconceived" [6] because in the end, Hart tried "to run two incompatible analyses together: the analysis of sociological statements, where existence can be separated from bindingness and thus from moral statements; and the analysis of internal normative statements, where it cannot. " [7] We saw other examples of this in the earlier chapters where I pointed out the tension between the moral and sociological concerns in Hart's work.

Now Detmold notes that Hart seems to understand the "assumption of fact" and the "assumption of appropriateness" as necessary parts of the internal point of view. The factual nature of a rule refers to its existence or use as a standard. But especially where the ultimate rule of recognition is concerned the meaning of appropriateness cannot derive from validity or legality if circularity is to be avoided. [8] Ultimate rules of recognition have no formal sources of validity, so the question of their existence must be decided upon other criteria. Detmold surmises, I think correctly, that the standard of appropriateness of the ultimate rule of recognition Hart refers to must be the assumed necessity of its bindingness. So, judges who "seriously assert" laws, are assuming that they are binding on those subject to them. Hart, I should note, does see the importance of bindingness on judicial behavior with respect to rules of recognition, other secondary rules, and primary rules since officials too "must regard these as common standards of official behavior and appraise critically their own and each other's deviations as lapses." [9]

The assumption of bindingness is necessary, otherwise as Detmold writes: "Anything less would preclude the possibility of a rule decision to act, for it would necessitate some further deliberation before action." [10] In other words, without the assumption that bindingness covers *all* the rules in a legal system, rule-based judgement itself cannot be *operationalized*. This assumption of bindingness is moral because rule-decisions are final and conclusive. Further evidence of the moral character of bindingness is suggested, as we have seen, by the fact that legal obligations require sacrifices and involve sanctions.

Moral justification is necessary to and implied by common and inevitable activities of a legal system. We can see this by reconsidering briefly the nature of capital sentences and introducing the complexity of hard cases respectively. Let us agree that someone must take moral responsibility for injecting the prisoner with lethal drugs. Further, it seems obvious that responsibility-taking with respect to such and other serious matters must be morally justified. The only question seems to be the distributional one. Where is the moral division of labor here? Again, given the seriousness of capital sentencing in particular, we might say that everyone involved in the decision-process ought to take some responsibility. But on the other hand, since this *is* so serious, we had better not follow a simple distributive principle like strict equality. Some persons, it seems sensible to say, are better placed to take responsibilities *responsibly* than others. The further away one is from the decision the less responsibility one has simply because one has less opportunity to take the relevant responsibilities responsibly. This is a matter of fairness and logic. On this principle, judges and legislators are better placed than executioners or general electorates to take responsibility for making the decision, that is, they are better placed as individuals who can be understood as *accountable* for providing its moral justification. This is a matter of proper functions or roles.

I do not mean to suggest that legal positivists would deny that many legal decisions entail moral dimensions such as responsibility and justification. I just do not think they face these questions squarely within legal theory. Obviously, I think this distorts the understanding of law and decision making in law.

Hard cases, on all accounts, involve judges in moral deliberation and justification. This follows from a variety of considerations. Hard cases have no legal precedents and so force judges to other sources, and moral principles offer good candidates. The absence of legal precedents here makes the need for moral justification very obvious since by definition hard cases are very controversial ones, and since the decision rendered will also be final and conclusive, and require sacrifice. The controversy about hard cases between legal positivism and natural law theory revolves around the implications of this for the content of law and for our understanding of judicial roles and responsibilities.

The analysis of hard cases is also crucial to the conclusion that legal decision making entails moral *commitment*. Detmold argues this is the case because principles considered by judges in hard cases cannot be said to be *understood* by them unless they are "committed to [them] having weight in moral thought" and, very importantly, "committed independently of any enactment or establishment of [such principles] by the institutions of society." [11] This tracks much of my own discussion above about the way in which the strong social fact thesis renders moral argument into *quasi* -moral argument. These criticisms weaken the social fact and separation theses. Detmold does not always draw the particular implications out as well as they should be, given their severe impact upon the social fact thesis.

There are three reasons why judgements in hard cases entail moral commitment to principles: 1) Legal institutions, defined in terms of formal validity and the assumption of bindingness discussed above, cannot supply the "weight" of a principle , and therefore, can give no guidance with respect to adjusting the "weight" of principles. Very importantly, this implies that they cannot really be said to *refer* to them either, assuming that we cannot separate the *existence* of a moral principle from its *weight* as a moral principle. This corrupts Raz's "strong" social thesis [12] ; 2) Consideration of moral principles implies a kind of commitment to them. This presupposes a special sense of what it means to understand and employ a moral principle in the first place, and further implies the impracticality of Raz's "statements from a point of view" [13] ; 3) There is a proper judicial role which involves serious, committed consideration of moral principles in hard cases.

The legal institutions which serve to identify the rules of the system cannot supply the principles used in hard cases with the weight or decisional force which they need in order to accomplish deliberation in these cases. In other words, principles do not gain philosophical and moral weight because they have been referred to by legal rules. In earlier chapters, we considered the possibility that the criteria of validity might refer a judge in a hard case to a moral principle or a set of principles which might then be used to resolve a hard case *and* simultaneously, through the formal logic of validity, block the infusion of a principle's moral content into law. If, however, Detmold's argument about the *interdependence* of the weight of a principle and its very existence is correct, and I think it is, then it is hard to see in what sense referral could be made in the first place. The weight of principles is tied to, indeed arises from, the principle-based mode of reasoning itself, not from any formal process which functions primarily as a way of determining or identifying particular laws. If this is so, it is hard to see how the kind of decision making required in a hard case can be said to be *sourced* in non-moral, social facts.

The social fact thesis begs another question. Can moral principles and their weights really be said to exist anywhere *outside of* particular, practical, decisional contexts? Can moral principles, awaiting, as it were, conscription into the legal world be said to exist? How can they be said to exist unless in a context involving clear, *unmediated* commitments to them? Detmold argues that practical and moral judgement itself involves, is "against", and "founded on" particulars, that is, it is *about* individuals, their characteristics, the pertinent facts of their cases, and the justifications for including them in or excluding them from rules and principles. [14]

If, on the other hand, we imagine that legal institutions can refer to *already* weighted principles, referral would be rather to a *rule* not a principle. Since this is not what anyone intends, the weight attaching to principles must then vary with particular cases , and indeed, arise from deliberation itself. This relativity of the moral importance of principles in relation to particulars, though, need not be thought of as entirely arbitrary or subjective. The fact that the weight of principles fluctuates gains some respectability from the seriousness, openness, and soundness of the deliberative process itself. There is always the possibility for intersubjective agreement.

Would we want to say that legal institutions can refer to moral principles but *without* any weight attached to them? Detmold denies this and argues that "it implies that a particular principle might exist independently of its weight. But how could this be? If a principle had no weight it would have no function in moral or legal thought; and there would be no point in according it existence?" [15] I agree with Detmold here but I think he overstates the case . Surely it makes sense to talk about, for example, formal principles of justice and their important functions in moral and political thought even though they carry no substantive weight. The important point is that in hard cases certain *kinds* of principles are required. For only weighted or substantive principles are likely to settle a hard case and these cannot be referred to by valid referential rules because their existing weightedness would then translate into a requirement that judges take the weight in the same way as they must take the bindingness or the *absoluteness* of a rule over some range of particulars. [16] But then there would be no hard cases.

All this suggests that many, perhaps all of the important, legal precedents in a legal system live three lives. They function formally, and lastly, as rules for the direct and immediate determination of particular cases and laws. But this life is a second reincarnation. For prior to the establishment, recognition, or use of a judge's decision by others *as* a legal precedent, the same decision served as a *candidate* for the status of legal precedent. And prior to this stature as a candidate, or its first incarnation, the decision existed as the direct *product* of moral judgement and justification.

This brings us to Detmold's point about the nature of understanding moral principles. When judges consider principles in hard cases they are weighing *positive* values. *All* the principles have some merit, otherwise they could not be considered as candidates for facilitating resolution of a hard case. But to see the positive merit of a principle one must either understand it from the inside, so to speak, or from some sympathetic or moral point of view on the outside, not as Raz and other's suggest, from a detached point of view. Detmold writes that: "To see the value of a principle is to be committed to it, that is, to be committed to assigning it a certain, though over cases infinitely variable weight. This is a logical truth." [17]

I think this calls into question the idea put forth by Raz and others that officials can be understood as saying something helpful or interesting about the *relationship* between law and morality, especially as concerns justification, by assuming a *detached* position with respect to laws. [18] A detached statement according to Raz, is a "*statement of law* , of what legal rights or duties people have, not a statement about people's beliefs, attitudes, or actions, not even about their beliefs, attitudes, or actions about the law...Its utterance does not commit the speaker to the normative view it expresses...[but] shows that *normative* language can be used without a *full* normative commitment or force." [my emphases] [19] Raz, of course, implies here that detached statements are used with *some* normative force.

Now there are three difficulties with this notion: 1) If we cannot understand normative standards unless we are committed to their having *some* positive moral value, how can we be certain about what people who *are* fully committed to them ought to do respecting *their* rights and duties? In other words, how can the making of detached statements tell us anything important about the way in which they and their societies use normative language? ; 2) If we are here, as Raz suggests, providing advice to others which amounts to "warning others of what they ought to do" [20], how can this be understood as a "statement of law" at all? For this kind of advice says little more than 'you should do X if you want to stay out of trouble', and so qualifies more precisely as a statement about sanctions and prudential interests, not of law. This begs the question, then, about whether the making of detached statements really constitutes *using* normative language at all . Rather, I think it is more accurate to say that such statements report or make predictions about normative consequences ; 3) Since, as Raz says in the passage immediately above, these detached statements *cum* warnings are "characteristic of the lawyer and the law teacher" *not* judges, it is also very difficult to see how the making of them constitutes headway on the question of justification. Related to this, if such statements are more characteristic of lawyers than judges, it is hard to see how such statements directly inject normative force into the law.

Now because judges are involved in making assumptions about bindingness, and providing moral justifications, and committing themselves morally or at least sympathetically to principles while deliberating in hard cases, it makes sense to develop the notion of "proper judicial responsibility". [21] I think, though, that it makes more sense to discuss this in the contexts of procedural and substantive natural law, not here at the more conceptual level of establishing the "unity of moral thought." So I propose to take this up directly in the discussion of Lon Fuller's work. I think that Detmold's arguments show that the legal positivist has one road open to him, the course of retreat. "Law, he might say, *is* a thing of rules" [emphasis in the original], as Detmold suggests.[22]

The down-side is clear. Legal positivism cannot be said to deal sensibly with the hard case, and this strongly dilutes the utility of the social fact thesis with respect to the determination and justification of law. I am, of course, aware that legal positivists like Hart do not pretend that the social fact thesis is sufficient with respect to determining and justifying the law precisely in every possible case. However, as we have seen, it does assume that every possible case is covered in the sense that the social fact thesis is understood as necessarily validating or instantiating movement into moral evaluation in hard cases. But as we have seen, this is not be plausible under the interpretation of moral principles and reasoning discussed above.

Detmold's critique weakens the claims made for the social fact thesis. Legal positivism suggests that the appropriate attitude in hard cases is one which first and foremost must search for validated channels into moral evaluation. If there are no validated paths, no moral argument about the determination of law can occur. There may but need not be a coincidence between the most appropriate moral principle and a validated path open to consideration of it. Further, there may but need not be a coincidence between the legal positivist view of internal attitudes and the appropriate attitudes associated with the understanding of and commitment to moral principles. The social fact thesis is weakened in two ways. If there are no validated paths to moral argument in hard cases, the law cannot be determined fully by social sources. If there are validated paths, they may not actually lead in the direction surmised by legal positivists if the discussion above about the nature of moral argument and principles is correct.

Second, even in normal cases or those involving clear legal precedents, the justificatory strength associated with the social fact thesis by legal positivism seems inadequate especially in relationship to the most serious cases involving questions about life and death and the security of persons. From a moral and practical standpoint, the idea that capital punishment may be legally justified and therefore, carried out , when its moral justification is either ignored or deeply controversial is disturbing. Probably most of the time in these serious cases the legal precedent will be associated with a moral principle. But there does not seem to be any good reason for pretending that moral reasoning and justification are not or need not be involved in them, and that utilizing such argument does not appropriately describe the role of a judge in normal cases.

Chapter Seven

Procedural Theories

Procedural natural law theorists, like Lon Fuller, argue that there are some essential features of the *rule of law* which lend law moral value. Most of the force of Fuller's criticism and the general position of procedural natural law, targets and strikes first against some important interpretations of the separation thesis. It shows again the sense in which officials and subjects act as rational and moral beings in their dealings with the law. In other words, it shows the importance of developing models of role-responsibility which entail moral criteria. This is not to say that Fuller's argument has no effect on the substantive content of law. For I argue that it does. Attention to the rule of law in judicial practice does not inject moral content into law directly. It does however act as a barrier to the injection of evil into law, and thus is very important in relation to one of the main features of the *integrity of law*. As we will see, the rule of law constrains the possibilities for evil in the law.

As a natural law theorist, Fuller straightforwardly identifies law as a "purposive enterprise." Law is the activity of subjecting individuals to rules. Perhaps on the face of it, this definition seems almost indistinguishable from Hart's notion of "guidance ...by determinate rules" [1], that is, from the view of law which concerns rule-based judgement. The differences, however, are vast and result from the idea that law is understood as a rational form of activity used and developed by rational individuals. For Fuller, the *factual* existence of legal norms and structures presupposes some prior level of rational activity and purpose. This means that there is a qualitative aspect to principles of legality, or the rule of law, which relates directly and positively to the achievement of rational and responsible polities, and which distinguishes the activity of law from other ways of subjecting people to order. The enterprise of law "contains a certain inner logic of its own [and] imposes demands that must be met (sometimes with considerable inconvenience) if its objectives are to be attained." [2] Fuller writes that the activity of law involves "a commitment to the view that man is, or can become, a responsible agent, capable of understanding rules, and answerable for his defaults." [3]

Related to this idea is Fuller's discussion of the "morality of aspiration" which he finds basic to human nature. The "morality of aspiration is most plainly exemplified in Greek philosophy. It is the morality of...the fullest realization of human powers." In terms of the morality of action, this cashes out into a view which "condemn[s] for failure, not for being recreant to duty; for shortcoming, not for wrongdoing...instead of ideas of right and wrong...we have rather the conception of proper and fitting conduct, conduct such as beseems a human being functioning at his best." [4] In contrast to this, indeed, often in conflict with the morality of aspiration, is the "morality of duty [which] finds its closest cousin in the law." [5] We can see from the above that even though Fuller does not put forward any substantive measures of proper human ends, he does seem to value the notion of comprehensive or all-round human flourishing which presupposes a variety of goods, and so seems at least to brush up against the view of *ethical naturalism*. In so far as he shows that law must be committed to "the view that man is, or can become, a responsible agent" he seems to sow the seeds of *non-consequentialism* .

It is worth looking at a few relevant observations made by Raz. He writes, "the rule of law treats people as persons at least in the sense that it attempts to guide their behavior through *affecting* the circumstances of their actions. It thus presupposes that they are rational, autonomous creatures and attempts to *affect* their actions and habits by *affecting* their deliberations" [my emphases]. [6] On Raz's terms, legal systems need only incorporate the rule of law in the weakest of senses, since the rule of law does not constitute an important feature of law. Indeed, he discusses the rule of law as being *independent* of law itself, since it responds to "evil which could only have been caused by the *law* itself " [my emphasis]. [7] Raz's discussion here seems ambiguous and perhaps contradictory.

First let us consider what he says about the rule of law. At another point he writes, "Clearly, the extent to which generality, clarity, prospectivity etc. are essential to law is minimal and is consistent with gross violations of the rule of law." [8] The meaning of Raz's concept of the rule of law is ambiguous simply because he chooses not to flesh it out. All we know is that it contains some obvious characteristics of *rules* as well as some unspecified characteristics implied by his "etc.". We should note, though, that we are speaking here of the rule of *law* not the rule of *rule(s)*. In any case, doesn't Raz's specification of some minimal characteristics of the rule of law imply the importance of maintaining them in law or in legal practice? If so, is upkeep of these and other features of the rule of law consistent with the idea that there may be "gross violations" of the rule of law ? Can the rule of law mean much at all when it can be spoken of as existing even while having its main features grossly violated?

Now let us consider briefly the view of the relationship between the rule of law and rationality put forward above . Is the capacity to have one's behavior and deliberations "affected" the most noteworthy feature of rationality? Is the most important function of law in relation to deliberation its capacity to affect it? If so, are there any ways in which it is improper for law to affect deliberative behavior? Can a more appropriate understanding of the rule of law help answer this latter question? If so, don't we need to clarify the meaning of the rule of law more precisely than Raz has done? Fuller's view is that the law has a positive function to assist deliberation and action and utilizes the rule of law toward this end.

According to Fuller, the rule of law includes: 1) "generality" or the idea that social control or order requires the application of general rules to particular cases; 2) "promulgation" or the idea that laws must be publicized or that information about laws must be accessible; 3) prospectivity or the idea that laws should be generally forward looking or that as a general rule persons should not be punished for past acts which were legal at the time of their commission; 4) "clarity"; 5) non-contradiction; 6) the idea that laws should only require that which is possible to do within reasonable bounds including moral ones; 7) "constancy" through time; 8) "congruence between official action and declared rule" or the idea that the administration or practice of law should be consistent with the letter and spirit of the law. These principles of legality, or the features of the rule of law, or the "eight ways" of preventing a legal system from miscarrying itself [9], are grounded in the general aspirations and capacities of human nature. As we have seen, Fuller ties these principles first, to the "morality of aspiration", and second, to the potential for and desirability of rationality and responsibility. These ideas serve as objective, grounding principles for Fuller, and for natural law theory in general. So we see again a hesitant move by Fuller toward *ethical naturalism* .

Fuller describes the purpose of the rule of law helpfully when he likens the principles of legality to the "natural laws of carpentry."[10] Now this metaphor has suffered considerable exaggeration and misrepresentation at the hands of Fuller's critics. For example, Raz and Lyons respectively suggest that Fuller likened the rule of law to "tools, machines, and instruments", and law-making and adjudication to the work accomplished in "warfare, professional assassination, slave-holding, and systematic genocide."[11] Neither of them quotes or discusses Fuller as being concerned about activities *like* carpentry, instead of with artifacts in general, or with every conceivable human activity which has a purpose or an end.

Fuller's metaphor, however , is apt. For law is unlike warfare etc., and like a dwelling in the sense that it can be made more or less rational, or perhaps metaphorically, more or less comfortable. We should understand the principles of legality as performing a function akin to building sound foundations and frames. The strength or integrity of law can be gauged objectively. For example, due process which is understood by Fuller as a constituent of the principle of "congruence between official action and declared rule" [12] might be more or less well-practiced in any given legal system. The latter principle is understood by Fuller to be "the most complex of all the desiderata that make up the internal morality of the law" [13] and as the "key principle" which distinguishes law or legality from "managerial direction" [14] since the "crucial point in distinguishing law from managerial direction lies in a *commitment* by the legal authority to abide by its own announced rules in judging the actions of the legal subject." [my emphasis] [15] This, of course, points us in the direction of another feature of the *integrity of law* , that is, the idea that we can identify appropriate and inappropriate judicial roles and responsibilities.

If the rule of law can be said to constrain the possibilities for evil in law this is likely a function of the "congruence between official action and declared rule" given its priority amongst the criteria of the rule of law. In order to see how this occurs we must examine the details and operation of this principle more closely. Now I think it uncontroversial to say that systems of law and politics generally shy away from legislating every little detail under the presumption that it is in fact practical or desirable to leave a good measure of human and social interaction open and free as long as this can be accomplished in an orderly, relatively stable, and cooperative way. Legal systems coordinate the complexity and diversity of societies, they are not about achieving a generalized form of automaton-like behavior toward or according to some master's plan.

As we saw in Chapter Two, there is no mention in legal positivism of the importance of maintaining any kind of mutual relationship between officials and subjects, or in maintaining the integrity of judicial practice . According to legal positivism, if subjects generally conform to laws and officials accept the rules of recognition everyone is doing all that must be done in order to say that law exists and can be justifiably applied. At the same time, even though legal positivists will not disagree that the main purpose of a legal system is to achieve a stable social order, they speak of no one having any *responsibility* at all toward this achievement. As Fuller puts it, "There is no recognition in

Hart's analysis that maintaining a legal system in existence depends upon the discharge of interlocking responsibilities - of government toward the citizen and of the citizen toward the government." [16] It is becoming more and more clear that a central point differentiating legal positivism from natural law theory concerns the question of the mutual relationship between officials and subjects- one of the four features of my understanding of the *integrity of law.* We have seen this concern in Detmold's discussion of moral commitment, we see it now with Fuller, and we will soon see it in Finnis' discussion of "focal meaning", and finally we will see how the concern stretches back through centuries of modern political and legal thought when we examine Rousseau's understanding of law.

Fuller no doubt places great expectations in this regard on the idea of "congruence" between official actions and rules. How well does this fare? The principle is surely "complex". Fuller writes that it "may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power." [17] On the positive side, Fuller writes that there are "procedural devices designed to maintain it...[including] most of the elements of 'procedural due process', such as the right to representation...the right of cross-examining adverse witnesses...habeas corpus and the right to appeal...[e]ven the question of 'standing' to raise constitutional questions." [18]

I think we can and must short-hand the complexity and diversity of this content. Fuller's discussion here suggests three main concerns: 1) Fidelity to legislative and judicial purposes. This is implied by the importance of "interpretation" and the importance of "preventing a discrepancy between the law as declared and as actually administered." [19]; 2) Effective procedural constraints on legal and political authority. This is clearly the point of "due process"; 3) A strong code of personal, legal ethics. This is obvious given talk about corruption. These points together add up to an overriding concern to ensure responsible relationships between the legal and political systems as parts of the same social whole. Indeed the three points above are means toward this larger end. Interestingly, attention to all these points promotes *respect for law* , the fourth feature of the *integrity of law.*

Now how does all of this constrain the possibilities for substantive evil in the law? I think the most important idea here is implied by the *equality* between all individuals with respect to their legal rights. If these rights are effective and taken as legitimate by all concerned, a strong measure of genuinely *public* scrutiny is ensured. Even those minorities who find themselves out of material power can benefit provided that the public institutions guarantee them meaningful and substantial access into the legal system. In addition, officials' recognition of their role-responsibilities and honest, rather than pretended, commitments to public purposes surely must have some positive effect on decreasing the chances for great evil in society.

How do we know that the principle of the congruence between judicial actions and law is really part of the rule of law, part of the inner morality of law? The answer to this question turns us back to the idea of the morality of aspiration and the rationality of human nature, and to what I take to be some pertinent empirical indications of this. Individuals as subjects and citizens simply *expect* certain behavior from officials and officials often *respond* to this.

Rousseau too, makes this quite plain, as we will see. On this point, Fuller writes: "Silent testimony to the force of [judicial and legislative] commitment can be found in the strenuous efforts men often make to escape [the coercive force of law]. When we hear someone say he is going to 'lay down the law' to someone else, we tend to think of him as claiming a relatively unfettered right to tell others what they ought to do. It is therefore interesting to observe what pains men will often take *not* to 'lay down law'." [emphasis in the original] [20] This shows that the role-related responsibilities which apply to officials and citizen-subjects, and which are constitutive of the *integrity of law* , are not ungrounded theoretical projections or speculations thrown onto existing social practices, or as Fuller says, "not, then, simply an element in someone's 'conceptual model'." [21]

Chapter Eight

Substantive Theories

In this section I consider two of the more comprehensive natural law theorists, the contemporary John Finnis and the modern Jean-Jacques Rousseau. I focus on these individuals because of their comprehensiveness and as a way of providing natural law theory with an historical and philosophical depth which I think legal positivism clearly lacks. I also pay particular attention to the recent work of Daniel Skubik as a way of re - addressing the foundations and some of the basic assumptions and concerns of natural law theory with respect to basic goods and their implications for legal positivism.

The specific argument about the moral status of basic human needs in Skubik's work, At the Intersection of Legality and Morality , is clear and stands in a profound and critical relationship with the separation and social fact theses. The kinds of arguments he puts forward regarding the minimum content of natural law show that it makes at least logical sense to divide the category of *substantive* theories into two parts: *minimalists* and *maximalists*. In the first section below, I elaborate upon his analysis of natural interests and show how this supports creation of the *minimalist* sub-category of substantive natural law theory.

Skubik makes some very important critical points about the relationship between basic human interests or goods, morality, and law. The argument shows again how ethical naturalism is a fundamental feature of natural law theory. Skubik provides some strong reasons for why the most *basic* human interests constitute morally-relevant goods, and why they *necessarily* infuse the law with moral content. His argument in support of a minimal content view of natural law allows us to classify substantive natural law theories as either minimalist or maximalist. Generally speaking, the difference between the two categories involves the content of the schedule of needs identified as in the service of law. In Aristotle's terms, we are concerned here with the difference between "mere life" and a "good life", or with the needs associated with survival versus those associated with survival-plus interests and goods.

In the Concept of Law, Hart speaks of "simple truisms" or "natural facts and aims" or the "minimum purposes of beings constituted as men are" which have a necessary but non-moral impact upon law in the sense that: 1) they explain the existence of and necessity for legal sanctions; 2) they explain the existence and indispensability of "minimum forms of protection for persons, property, and promises". [1] There is no question here that Hart does mean minimum. For as we have noted, basic survival may be purchased "even at the cost of hideous misery" [2], and so long as society "offer[s] *some* of its members a system of mutual forbearances" [emphasis in the original] [3], the legal or political authorities might go ahead and "subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large or small." [4] The picture we get thus far of the relationship between natural human facts and law suggests that legal systems must necessarily *react* to natural facts, but not as a moral response, that is, not in any way which conditions such responses upon serious consideration of questions about moral right and wrong as these apply to society as a whole.

But if the relationship between natural needs and law amounts to an observation about the inevitability of a very broad *social* reaction to such needs, do legal systems *per se* necessarily have anything significant to do with this at all? It does not seem that legal systems respond to natural facts in any immediate or direct sense since powerful groups have always secured minimal protection for themselves in the absence of Hartian legal systems. Evidently, according to Hart, in order for political authority to form, all that must be present is the "voluntary co-operation" of a few, obviously powerful, individuals. [5] Such individuals *might* but need not at some point oversee the development of a modern legal system constituted of primary and secondary rules and official acceptance. In other words, the natural facts in question do not seem to have any *special* impact on modern legal systems, or at least not any more than they do on the most authoritarian, tyrannical, and oppressive political regimes. For such political systems can impose sanctions and secure minimal protection for the few without interposing the conditions of legal validity between brute sanctions and brute rule. Perhaps one might agree with Hart that this view of things supposes a " *simple* version of Natural Law." [my emphasis] [6] On the other hand, it is hard to see why this outlook really qualifies as a *version* of natural law at all.

The natural facts considered by Hart, and re-tooled by Skubik, are interests in survival. Survival itself, and all the interests which compose it are, according to Hart, "contingent fact[s] which could be otherwise." [7] Evidently, they are contingent upon the quirks of human evolution. Human vulnerability "might one day be otherwise." [8] Approximate equality "might have been otherwise." [9] Limited altruism is important "[a]s things are." [10] The problems associated with limited resources "might have been otherwise than they are." [11] Finally, it seems to follow that "limited understanding and strength of will" is a problem at least partly because of the other limitations reviewed just above , and itself might have been otherwise if they had been. Partly because of their allegedly *contingent* character, but especially because Hart accounts for the pressure of needs in terms of political and legal reactions to these facts exemplified by the provision of security to a dominant and powerful *minority* , I fail to see how they can have any important, or truly moral status at all.

The natural but contingent facts or conditions of physical vulnerability, equality, limited natural resources, and limited stores of rationality, will, and good will indicate, for Hart and Skubik, interests in and needs for security and survival. According to Hart, there is a relationship of natural necessity between natural facts and law because humans and their societies react to these conditions by forming legal systems partly constituted by institutions which protect the property, persons, and promises of at least a *few* of a society's members. Now I have called into question Hart's view of the nature of this reaction, that is, whether it is correct to say that legal systems in particular are reacting to conditions, or whether it is better to say that society in general, or perhaps those who dominate society, react to them. In any case, natural law theorists and legal positivists are in agreement with regard to one general point, that is, there *is* a set of basic human interests which must be accounted for somehow in the legal system of a society. In other words, there are some imaginable prescriptions and sanctions which cannot be parts of any society's law. At the same time, there is much to quarrel about with regard to five points: 1) The content of the set of natural facts or conditions accounting for schedules of interests or needs seems open to argument; 2) The logical relationship between the natural facts or conditions explicated above and human interests or needs seems disputable; 3) The precise content of the schedule of human needs indicated by natural conditions and the relationships between such needs seems arguable; 4) The relationship between needs and law or the disposition of the latter with respect to the former; 5) The moral status of these needs seems controversial. For now, the last point is most important.

Hart would not agree with my statement that the nature of the reaction to natural conditions which he observes lacks moral status. That is because he seems to confine the concept of morality to "a system of mutual forbearances" involving matters of moral "importance" and appeals to conscience and character. Such systems are "natural between members of the dominant group." Law "follows morality" in the sense that it lends legal sanctions, rules , and special judicial attitudes to morality.[12] My view is that this fails as an appropriate understanding of morality because it does not distinguish moral behavior from the kinds of behavior common in the vilest of criminal organizations. No doubt racists bent on and capable of establishing eugenic purification might look on or *regard* their behavior as morally obligatory. This psychological fact is not in dispute. The lions may not cuddle up with the lambs. Neither is this in dispute. There is, however, a considerable expanse of moral territory in between the extremes where we can say something objective about the necessary relationship between the content of law and morality.

This is the point where Skubik makes some severe and decisive criticisms against Hart with which I agree. Skubik argues that even if the natural facts are contingent and could have been different, the philosophical presuppositions of which he seems seriously and wisely to doubt [13], these speculations are irrelevant in terms of understanding their relationship to human laws and morality. He writes that "the conceptual necessity which we are investigating is not that of the *world's conditions* . Our legal-theoretic dispute concerning conceptual linkages between legality and morality turns in part on the scope of logical necessity for law and legal system under the conditions which do obtain in *the world which we inhabit* . "[my emphasis] [14]

I think the impact of this criticism along with the one discussed immediately below help to force a reconsideration of the moral status of the natural facts under examination. Truisms about human nature do not necessarily imply a lack of moral status or the extremely watered-down, therefore, arguably non-moral status given them by Hart. What must be considered? Skubik suggests one important idea from which follow several others. Universalizeability is commonly understood as lending moral status to rules. Now, in practice, as Hart and a great many others including Skubik know, human interests in survival are only near-universal. Some individuals may not see any point in existence at all. But human interests in survival are, I think, sufficiently shared, or as Skubik says while taking a cue from Hart, do at least "seem universally reflected [as questions] in thought and language." [15]

Now, I would say that they are sufficiently shared so as to produce genuine moral status for a number of reasons: 1) the interest in or need of survival is a *common* interest; 2) it is *valued* as an important social objective or goal ; 3) this social valuation generates justificatory *reasons* and associated legal *rules* ; 4) the valuation itself along with the generation of reasons and rules implies accompanying principled *commitment* and a level of social *trust* attendant upon the pursuit of this goal; 5) the level of social cooperation implied by all of the previous reasons suggests that there will be a *generalized* receipt of benefits and sharing of burdens. Whatever the basic needs are which must be accounted for in a legal system, they are morally-relevant needs and lend moral content to the law. Legal systems and theories cannot be said to take an adequately moral account of the incorporation or importance of basic goods just by reacting to, or characterizing as a reaction, natural facts and interests through the implementation of sanctions and the achievement of security for a few commanders who themselves may not give a whit about the importance of achieving the generalized provision of even the most basic of human interests and needs. A significant part of the authority and justifiability of law depends on the generalized production and distribution of the objective goods discussed above. In other words, it depends on serving the common good.

Once we admit that there is a minimal set of needs which must be accounted for in a legal system, we beg the question as to its precise content. We might even note that the extension or expansion of basic goods, from security and survival-based needs to survival-plus needs, itself seems warranted both by logic and by some previously unnoted *natural* facts. For there would seem to be a strong and clear human propensity *not* to settle for mere survival given the smallest semblance of choice between it and a better life. Likewise, many have argued that *if* there is a basic good in security, for example, and if this is understood as a right, logically, a sound level of subsistence and a right to it seems to be a necessary condition for security and the right to it.[16] Starving, homeless, and jobless persons are without a basic level of subsistence and lack security. Arguably, such persons are less vulnerable or more secure, and have more opportunities to increase their security, if their diets are regular and reasonably nutritious. For these and other important reasons to be explained below, natural law theory takes a wider, more comprehensive view of the schedule of basic human needs and its relation to law.

Maximalists: Finnis

On the first page of John Finnis' scholarly work Natural Law and Natural Rights, he says that:"It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how and on what conditions such institutions [as human law] are justified and the ways in which they can be (and often are) defective."[17] Recall that I have identified the basic criteria of the concept of the *integrity of law* as proper justification, appropriate relations between officials and subjects, the limitation of evil by law, and respect for law. It is clear that Finnis' overriding concern is with justification and that this has important practical implications for all the other features of the integrity of law. Appropriate justification implies use of the ethical naturalist and non-consequentialist components introduced and discussed in the last chapter.

Later in the book, Finnis focuses on the specifically legal-theoretic interests of natural law theory. He writes that "the principle jurisprudential concern of a theory of natural law is thus to identify the principles and limits of the Rule of Law (X.4), and to trace the ways in which sound laws, in all their positivity and mutability, are to be derived (not, usually, deduced: X.7) from unchanging principles-principles that have their force from their reasonableness, not from any originating acts or circumstances...The ultimate basis of a ruler's authority is the fact that he has the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community's co-ordination problems." [18] Numerous issues previously discussed jump out to us from the excerpt above including: 1) With regard to justification, we see attention to proper grounding of moral principles and legal rules, and concern to define the nature of the strength or force of various justificatory logics; 2) With regard to the relationship between officials and citizen-subjects, we see interest in identifying the responsibilities of officials and citizens alike.

In the next two subsections, I center my own analysis on two points corresponding to the issue sets noted just above:1) the identification of the human interests, needs, or goods, and principles which define Finnis as a maximalist and substantive natural law theorist; 2) the identification of the relationships between these goods and the law itself and the ways in which these relationships flesh out the *integrity of law.* I also pay special attention during these examinations to illustrate the ways in which the four main structural components of natural law theory are presupposed. Specifically, I will discuss how Finnis' understanding of goods discussed under point one immediately above involves ethical naturalism and non-consequentialism, and how the jurisprudential concerns under point two immediately above entail rejection of the social fact and separation theses. That all of this can be accomplished shows why Finnis qualifies as a clear proponent of genuine, full-blooded natural law as I have set out its terms.

Basic Goods and Principles

The schedule of needs advanced by Finnis qualifies him as a *maximalist* because together the needs contribute to a comprehensive sense of well-being. As we saw above, minimalist theories define human interests in the bare terms of survival. Finnis' theory, like some of Skubik's arguments, are *substantive* because they support the idea that law necessarily and properly brings about certain moral ends meaning that its content is moral. Finnis distinguishes between the concept of happiness defined in terms of the pursuit and realization of particular interests and goods and the immediate satisfaction derived from this realization, versus the idea of "participating" in "basic values" and "the deeper, less usual sense of [happiness] in which it signifies, roughly, a fullness of life, a certain development as a person, a meaningfulness of one's existence."[19] Aristotle too, consciously formulates this sort of full or rounded notion of happiness. Whether or not we agree with the desirability of the particulars of these full notions is another question altogether. What is not in dispute is that the general difference between these two notions of happiness can be defined in terms of relative emphases on, for example, a social atomism of individuals, interests, and goods versus the public or communal character of individuals and goods, or the anxious pursuit of self interests versus participation in broader, rational plans and purposes, or happiness as a discrete, discontinuous result versus as a more continuous, developmental process.

As a way of understanding and defining the characteristics of the idea of happiness important to natural law theory we can see that it is very much unlike many common and contemporary Utilitarian and liberal ideas of happiness defined variously in terms of the pursuit and fair competition of individual self-interests, piecemeal satisfaction of essentially material desires or preferences, and the contemporary equation of utility with economic growth. The focus on *participation in* rather than *pursuit of* goods also is of crucial importance, and reflects attention to non-consequentialist concerns about moral agency. Individuals are not seen as anxiously drawn to and then away from discrete objects in an endless cycle of desire and satisfaction. Instead they are understood as having the capacity to survey in an objective, balanced, and effective way, the schedule of basic values open to them. The sound implementation and execution of rational plans with respect to a comprehensive sense of well-being is at least as important as satisfying identifiable desires and preferences for particular goods. They are not seen as rational calculators or as necessarily concerned with the instrumental relationship between their actions and ends.

Natural law theories do not understand the common good in terms of an aggregate product, that is, as the more or less unintended result of the collection of self-interested pursuits, or in the sense of the provision of a set of public goods relating to minimal juridical and economic infrastructural needs and intended as a way of legitimating the pursuit of private interests and the inequality resulting from this. While bourgeois models of happiness need not and should not be thought of as altogether incompatible with natural law theory, the latter rates the former as a rather slight and one-sided understanding of human good. I do, of course, understand that Utilitarianism and liberalism contain within themselves serious-minded and sympathetic approaches to questions of social welfare and justice. This is evident in the thought of J.S. Mill, Hobhouse, and Rawls.

At the same time, there are clear limits to liberalism's capacity to formulate the conception of good in ways that do not place primary emphasis on the value of individualism, self-interested pursuits by individuals, the frequent use of instrumental rationality, general and aggregate-level conceptions of good, and the acceptability of serious levels of material inequality. Because of this, there must be a concomitant deflation of the importance of individual life in a community, the development of practical reason, and participation in common goods. Just these sorts of circumstances are presupposed by and must result from, for example, Rawl's "original position" and the narrow set of goods he argues are to be treated by individuals in this position. According to Rawls, individuals are to concern themselves primarily with the goods of liberty, opportunity, wealth, and self-respect. Under conditions of the original position, it is rational to view levels of inequality as acceptable if they are to the greatest benefit of the least advantaged.

Now I am claiming that the natural law view of the relationship between the individual and society is superior to the view of liberalism since it emphasizes development of practical reason and the importance of achieving goods within social relationships and communities. The alternative, liberal view, focusing on the importance of deciding and acting on interests and goods *as* an isolated individual is inadequate for one obvious reason. It is not reflective of reality. That is, it fails to reflect past, present, or foreseeable future social circumstances. Historically, the classical liberal view of Adam Smith or the "rugged individualism" which animated early 19th century America were challenged strongly, from the start, and to their final demise except symbolically and in rhetoric, by mercantilism and later and up to our own day, by corporate individuality. Both of these social forms give the lie to the view that individuals are even remotely capable of operating successfully as independents in the real worlds of politics or economics.

Of course, Rawls' original position is not to be understood as a political or economic standpoint, but as a moral one. So there is important agreement between Rawls' liberalism and natural law theory with respect to the idea that individuals can achieve a sense of independence when taking up a moral standpoint. The criticism Finnis makes, and which is supported by the communitarian critiques of Sandel and Taylor, and by many others, is that Rawls stacks the deck with presuppositions about the nature of rationality and the value of primary goods. Finnis describes Rawl's view as a "thin theory of the good" and as a "radical emaciation of human good" involving "derivative and supporting or instrumental goods" rather than basic goods. [20]

There are other difficulties associated with the question of justice. Liberal and libertarian theories sometimes focus exclusively on the "justice of acquisition and transfer" side of this moral question [21] , and generally do not focus strongly on a measure of socially valuable production, and sometimes justify private property and speculative market dealings on the basis of what amount to paper gains in economic value , and have gone so far as to condone the right to destroy one's own justly-acquired private property. [22] Locke, of course, sometimes seems to take seriously the social nature of goods and property as when he discusses the importance of adding value, not wasting resources, and not monopolizing various opportunities. [23] In Locke's theory, however, there is at least considerable tension involved in the relationship between the various justificatory principles he uses. The values of liberty, utility, equality, efficiency, and opportunity do not sit in harmonious relationship with each other just because, with the exception of the requirement of not wasting resources, Locke does not observe any clear limitations on the amount of property which can be acquired by an individual, and so ignores many questions about the relationship between power, justice, and the common good.

As we will see, Finnis focuses his view on two key ideas, that is, on the importance of practical reason and the common good. The latter entails positions on distributive justice and private property rights. Finnis adopts the traditional natural law view which can be found in both Aristotle and Aquinas [24], whereby "justly made" private holdings "beyond a certain point" are still understood as "part of the common stock" and are only justified in so far as this provides "common benefit", and where owners have "dut[ies] in justice to put it to productive use." [25] While natural law theory might not specify a cap on the amount of wealth an individual can accrue, it seems to me that it ought to be capable of insisting on certain requirements with respect to economic justice. First, there should be a serious, regular, and generalized public discourse about the rights and especially about the responsibilities to society attendant upon the ownership of private property. Second, with respect to the measure of socially-valued production, there should be norms recognizing the irresponsibility of development for its own sake, and related to this, equating personal hoarding with wastefulness.

Natural law theory defines common good in relation to effective and substantial participation in one's community and in the goods of the community. Finnis describes the common good as "a set of conditions which *enables* the members of a community to attain for themselves reasonable objectives, or *to realize reasonably for themselves* the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community...it implies only that there be some set (or set of sets) of conditions which needs to obtain if *each* of the members is to obtain his own objectives...some such set...is no doubt made possible by the fact that human beings have a 'common good' [in the sense that there are goods which are "*good for any and every person* "]."[my emphases] 26

If we are to clearly distinguish natural law theory's concepts of justice and common good from other political and moral theories, we have to take very seriously its contentions that individuals are *equal* to each other in the sense that they are members of a community and participants in the community's goods, and that each individual must be enabled to participate effectively in these goods, not just given opportunities to achieve theoretically unlimited status and wealth. There would seem, therefore, to be severe implications for contemporary educational and economic institutions to start with. But this takes us a little way off our track. We need to pay attention to the non-consequentialist component of natural law theory. As suggested by the italicized portions above, individuals, as moral agents, are clearly in the driver's seat.

True to a non-consequentialist point of view, it is the individual, what she does and how she does it, that supplies moral relevance and value to desirable ends or objectives. With respect to judgements about how to apply the basic aspects of well-being "each one of us...is alone." [27] Notably, and contrary to legal positivism, this intense concern for agent-centeredness extends into the field of law itself. Discussion of this point, however, is postponed until the next section. What is important to note here is that the individual in her rational and moral capacities stands as the source of moral relevance and value. Decisions and actions do not attain moral value on consequentialist grounds. Finnis confirms these points when he writes that:"The principles that express the general ends of human life do not acquire what would nowadays be called a 'moral' force until they are brought to bear upon definite ranges of project, disposition, or action, or upon particular projects, dispositions, or actions." [28] Since it is individuals who have ranges of project or particular projects, *they* must bring principles to bear upon their projects in appropriately responsible ways.

But where do these principles come from? The answer to this question takes us back into ethical naturalism. Finnis identifies a schedule of seven irreducible, self-evident, and objective, "basic values" grounded in natural inclinations or drives. [29] Finnis does not always clearly identify the attaching inclinations. For the sake of clarity I set out these relationships in Figure 8-1 below:

Fig. 8-1:

Inclination	Value
"drive for self preservation"	life
"curiosity"	knowledge
"enjoy[ment] for its own sake"	play
appreciation of "beauty"	aesthetic experience
gregarious or social nature	sociability (friendship)
self-consciousness or awareness	practical reasonableness
concern for "origins"	religion

There are three important claims here, the first of which is more or less uncontroversial so I will not do more than mention it: 1) these basic values correspond with these natural inclinations; 2) these basic values are the basic values which are "good for any and every person" and constitute "all of the basic purposes of human action" [30] ; 3) these basic values are self-evident. Before discussing the relationships between inclinations and goods, and the latter two points in detail, I want to make one point very clear. From the standpoint of natural law, and in particular, looking at the problems we are about to examine especially in terms of the non-consequentialist aspects of natural law theory, the acceptance of *all* the parts of this schedule of basic goods is not as important as acceptance of the *way* to deal as an agent with any comprehensive, well-rounded list of goods *like* this one. For example, one might describe the value corresponding to the concern for origins as philosophy rather than religion. Finnis would probably argue, however, that this involves, logically and practically, a begging of questions. No doubt, one could counter with the same charge.

But the importance of practical and moral method does not go away whatever we decide on this particular issue. For it derives from the fact that though humans hold some comprehensive set of basic goods promotional of the relevant sense of well-being in common, the ways in which these goods can be participated in and realized is diverse. Hence the objective need to prescribe a method consistent with the comprehensive nature of human goods, and appropriate to the practical problems posed by the diversity of their related practices. The method is defined by Finnis as "practical reason". As we can see, it has natural, practical, and logical bases. For our ability to use practical reason depends first on having the capacity to do so, and this capacity rests partly on the experience of the self or upon self-consciousness. Secondly, the possibilities for practical reason depend on recognizing its objective value as described above.

Now if we accept the existence of *any* of the particular basic goods, say of survival or "life", and understand it as being "good for any and every person", it seems to me that the onus of explanation of why the schedule of human goods should end here, or should not be comprehensive rather than minimalist, and descriptive and prescriptive of a good life rather than of mere life, must be on the person who favors the lowest common denominator approach. If humans can be said to have *one* common enterprise, why shouldn't they have others too? Given the opportunity, individuals and societies are not likely to settle for mere life, or survival only. Given the means to secure their basic survival, societies and individuals everywhere move further in an effort to improve their quality of life. It seems that this effort involves participation in and realization of many if not all of the basic goods set out in the figure just above. All societies exhibit concern for these values, and so these values seem to be at least good for any and every society. Are there any human societies which do not show concern for say, survival or life, sociability, play, and religion?

Finnis suggests that basic goods are *basic* in at least three ways: 1) They are basic in the sense that the "countless" other goods are "ways or combinations of ways of pursuing...one of the seven basic forms of good, or some combination of them;" [31] In other words, the basic goods under discussion here logically entail many other forms and permutations of goods. 2) They are basic with respect to human action in that they supply its "purposes" or objectives; [32] 3) They are basic since they are irreducibly equal and self-evident. [33] Since it appears that the first two points are only controversial with respect to the question of the *completeness* of Finnis' schedule of human goods, I will focus discussion on the last point only.

While anthropology and the theory of ethical naturalism which grounds motivation and value in both psychology and reason can explain the general incidence of basic goods in human societies, this does not supply any particularly strong or decisive reason why any particular individual *qua* agent should participate in any particular good(s) at all including these ones. Point three above implies that basic goods are basic in relation to some of the *internal* relationships between them, and in relation to their *epistemological* setting. They are equal to each other in the sense that they are logically and practically independent of each other in that they can reasonably be taken as goods in themselves, and equal to each other in that they come to be known to individuals *as* basic, non-moral values in roughly the same way.

First, basic values are *equal* as "general"or non-moral forms of good. Only these forms of good can be valued as things important to have "as such" or in themselves, that is, not for their consequences and not because they are simply desired. According to Finnis, the valuation of a *basic good* is not to be understood as "stating a moral obligation, requirement, prescription, or recommendation." [34] Perhaps the best way of understanding the sense of a basic value having *value as such* is to reflect on the absence of the value, or upon the presence of its contrary. Play is valuable as such against toil. Knowledge is valuable as such against ignorance. But these are not moral judgements because we say nothing about the variety of ways in which any basic goods might be participated in, or about the situations in which participation in a value seems important to undertake. Still, the judgement that knowledge or play are worthy pursuits is not empty because being non-moral. Indeed, such judgements feed into the soundness of moral judgement itself.

Further, an objective level of *equality* between the basic goods can be seen by imagining and shifting our perspective to situations where each good can assume primary importance over the others. [35] Given the circumstances, each of the goods might be reasonably understood as the only good in itself. So, objectively-speaking, we can see that there are times when each value might assume pride of place over the others, and therefore, can be understood as an equal in terms of this capacity. It seems reasonable to assume, however, that in practice, most individuals usually participate willingly in more than one value. Therefore, situationalism itself seems like a common predicament or experience for individuals to confront. At least one reasonable, though preliminary, step out of the predicament of situationalism is to take the values which one wants to realize, and which define particular situations, as equal to each other in the sense that they are all worthy of pursuit under the proper circumstances.

Indeed, there is a basic value which attaches to the moral and practical problem of situationalism itself. *Practical reason* , or proper moral method, is the value associated with the need created by the relationship between the facts of self-conscious and inquiring agents on the one hand, and the moral and practical complexity of their lives . Finnis writes : "We have, in the abstract, no reason to leave any of the basic goods [given their equality] out of account. But we do have good reason to choose commitments, projects, and actions, knowing that choice [and time, luck, bad judgements, lack of knowledge or skill or honest desire etc.] effectively rules out many alternative reasonable or possible commitment(s), project(s), and action(s)." [36] Given these constraints, the equality between basic values, and the primacy of the moral agent, a practical method is required which can help agents accomplish effective and responsible decisions and actions.

This value, I would say, is the most important evidence of the non-consequentialist character of natural law theory. According to Finnis, it involves "freedom and reason, integrity and authenticity." [37] Further, it must be understood as the value which *supplies* that "moral force" to human purposes and objectives spoken of above. [38] Finnis discusses nine "requirements of practical reason" which define this good or the content of non-consequentialist method. [39] These include: 1) having a coherent or rational plan of life, 2) having no arbitrary preferences between basic goods or values, 3) having no arbitrary preferences between persons, 4) maintaining a reasonable distance or detachment from one's projects, 5) carrying through with one's commitments, 6) adopting reasonable means toward ends, 7) having respect for every basic value in every act, 8) promoting the common good, 9) following one's conscience. All told, these requirements provide a plausible alternative to consequentialist moral reasoning since they address the deficiencies examined in the last chapter.

They serve to correct the vagueness and inappropriateness of the concepts of maximization, general or aggregate level good, instrumentalist moral calculus, the over-extension of responsibility, and the inadequate treatment of justice. There are two ways in which practical reason treats these difficulties in clear non-consequentialist terms: 1) some of the requirements, notably, numbers 2, 5, 6, 7, and 8, redefine the efficiency and reasonability of the relationship between means and ends; 2) some of the requirements, notably, numbers 1, 3, 4, and 9 serve to secure equality and justice as central considerations of moral reasoning and judgement. This supports my contention that the main function of ethical naturalism in natural law theory concerns epistemological and meta-ethical questions, whereas the non-consequentialist component responds to questions about particular and practical determinations of moral right and wrong.

Someone might object that the basic values of knowledge and practical reason or the method available to agents as a way of relating decision, action, and the forms of good, are actually more important than the rest of the values, and therefore, unequal in relation to them. No doubt this is true, but not in any sense important to the understanding of the objective level of equality between the values discussed above. For example, certainly knowledge and practical reason are important as necessary *means* to the realization of other values, and the inclinations associated with each seem to be important motivators with respect to realization of most if not all the other values. But the objective equality between them stands only on the finding that all the values can, in particular sets of circumstances, *reasonably* be taken as the most important good in itself to realize, and that all the values are equally important to have compared with the possibility of their absence or of the presence of their contraries. Curiosity and the understanding of knowledge as a good can be motives and means to play and play itself might be used as a source of knowledge. On the other hand, play might be sought after purely from the motive of enjoyment and as an end in itself.

But how do we know that any one of these goods is worthy of participation and realization as a good in itself? What does it mean to say that knowledge of the basic goods or any sort of knowledge is *self-evident* ? Why is this sort of knowledge, if it be knowledge, important to have ? What function does this knowledge have in relation to the ethical naturalist or epistemological side of natural law theory? What function does this knowledge have in relation to the non-consequentialist concerns of natural law theory?

Self evident knowledge is knowledge which is *underived* and *indemonstrable*. In the areas of , math, some of the sciences, and logic itself there are many examples of indemonstrable principles commonly known as axioms. As Finnis notes, some of these examples are "*selected*...for their capacity to generate a system of theorems, proofs, etc. which is consistent and complete ." [my emphasis] [40] But especially in the areas of logic and reason, self-evident principles seem rather to be simply accepted, or assumed, or presupposed, not questioned, and never really chosen, perhaps because they are so much a practical part of human reality. This is the sense of the self-evident. Who seriously questions, for example, the notion that a statement cannot be both true and false? What higher principle could provide this lower principle with a sound logical and rational home? In any case, how could the truth of either principle ever be non-circularly demonstrated? The question is, can we, at the deeper level of basic goods and reasoning about them, find indemonstrable and underived and non-selected principles? Since moral and practical reasoning is not a closed logical system, the function of such principles must be to open it up for practical and effective participation, accepting all the while that the practice itself is often stricken with real conflict and muddle. This is an effort to smooth out the road, since there is no point here in connecting all the interstates and highways together.

Knowledge of the good of the basic values is said to be self-evident. The statement that knowledge is a non-moral good is *independent* of any moral evaluations of the different ways in which it might be meaningfully participated in. At the same time, statements about the value of a general or basic form of good do not imply that all ways of participating in it are commendable. Surely it makes practical sense to hold that play in general is a good *and* that playing with matches is not good. The basic values are *underivable* from any moral judgements and principles about the best ways of realizing the basic values. Further, demonstration of the existence of the general form of good called knowledge, for example, does seem *indemonstrable* since any proof or demonstration of the good of knowledge would presuppose the very principle it is attempting to show and thus would count as a circular proof.[41] Finally, the self-evidence of the statement knowledge is a good seems further substantiated since serious and public denial of the statement is self-contradictory.

But what about the self-evidence of say the *principle* , the basic good of play is itself good? Is the principle derived? Can it be demonstrated? Enjoyment for its own sake is a worthwhile and independent subject of participation. From what principle, or prior judgement, could this idea derive? It seems clear that the idea that play is good does not follow from any of the following principles : 1) Whatever one desires is good; 2) It is important for one to determine the basic goods; 3) Toil is bad or one should avoid bad things; 4) One should do that which is conducive to one's well-being.

Further, the successful *demonstration* of the idea that enjoyment for its own sake is good, is rendered hopeless since the understanding of this notion depends so much upon having the experience of this for oneself. One might try to teach someone play or enjoyment for its own sake, and the success of this depends partly upon activating the appropriate inclination. But this is not the same thing as teaching someone that play is a basic good and ought to be participated in. Here, we might try to activate the other's self-consciousness and curiosity directing it toward the significance of their playfulness. But, in the end, the appropriate understanding depends upon what the individual *qua* agent does. Here, it would seem that the most important motivating factors concern *self-generated* commitments. Finnis describes the process of coming to know the value of basic goods in terms of a *committed* reflection upon : 1) our experiences of inclinations; 2) the non-moral nature of basic goods; 3) the possibilities for participation in the basic goods given observations of other individuals and societies; 4) the logical place of self-evident principles in non-moral systems of logic. [42]

This of course brings us back to the non-consequentialist focus of natural law theory. Finnis describes the *function* of self-evident knowledge of the basic goods in what seem to be terms of a *necessary condition* for the injection of moral value into human activity itself. Individuals need to know that the basic, non-moral goods themselves are worthwhile *before* bringing them, and the varied substantive principles attaching to the varied ways in which they might be realized, to bear in an *effective* way upon their own projects. [43] Effective participation in any basic good, then, presupposes acceptance of all the basic goods as equally worthy of participation. One must first engage all the goods from a certain standpoint in order to participate sensibly in any one of them. Otherwise, it seems that one runs a variety of risks. For example, one forecloses one's options in well-being and perhaps invites disrespect of the values they wish to concentrate their own energies upon. In short, one fails early on to achieve practical reasonableness. Finnis sets out further details of the basic good of practical reasonableness [44], but there is not much point to discussing them any more here.

The function of self-evident knowledge touches on the ethical naturalism of natural law theory too. For obviously it involves reflection upon some of the rudimentary components of ethical naturalism including inclinations and non-moral goods, that is, upon natural epistemic properties having a bearing upon moral epistemic properties. Perhaps a generalized natural law *practice* could not get off the ground unless the individual participants each worked through the reflections described above. And perhaps the individual requires the grasp of self-evident knowledge as at least partial justification of his own moral decisions and actions. At the same time, I do not think that understanding or defense of the soundness of natural law theory as a theory of law, politics, and morality especially in comparison with legal positivism, requires that either its defenders or those who see weaknesses in legal positivism must first grasp the self-evidence of basic goods. The justification of natural law theory follows from the many weaknesses of legal positivism and the compensating strengths of the former respect to the features of the *integrity of law* . In order to put this into better focus especially where Finnis is concerned, we now turn to the examination of the relationship between the basic goods and the law itself.

Basic Goods and the Law

I dare say that in some not insignificant ways Finnis continues, though in a most comprehensive manner, a tradition conscientiously participated in by Fuller , and even presupposed by Hart himself[45] . That is, all of these writers agree about four things: 1) Legal systems cannot serve just *any* ends; 2) Partly as a result of this, judges and other officials cannot act in just *any* way while performing their legal functions; 3) The reasons behind these limitations, all agree, include the pressures of human nature and the nature of the rule of law; 4) These latter reasons produce connections between law and morality.

For Hart, as we have seen, these connections are not logically necessary because of his unwarranted conclusions about the contingent status of the conditions of human survival, and his (and Raz's) willingness to disjoin important features of the rule of law from that which is understood to be essential to law (that is, the intersection of primary and secondary rules and official acceptance of the most important rules of recognition), and his rather misplaced definition of morality in terms of any system exhibiting mutual forbearances. Most importantly, though, the connections he allows between nature and law are necessary and moral in a much stronger and substantial moral sense than Hart admits. For legal systems must respond positively to basic goods because they are *universal* (or near universal) needs. This guarantees necessary moral content in the law. In Hart's explanation, the sense in which distinctly *legal* systems, as opposed to organizations resting on power alone, respond to basic needs is not clear, and the basic goods are clearly not taken as universals. Finnis, and all maximalist natural law theorists including Rousseau, then, might be said to simply complete the various established logics advanced above, in the sense that they argue for the importance of achieving levels of well-being in and through law in addition to survival. Law responds rather than reacts to needs. In doing this, law gains a certain legitimacy unavailable to it through the legal positivist framework.

Taking the basic goods outlined in the last section as equally worthy of participation, it follows that the common good by and large involves the coordination effort necessary to facilitate the fact that individuals themselves pursue these goods sometimes in cooperation with each other, and other times in conflict with each other. Finnis describes the common good as including the ideas that: 1) the basic goods are "good for any and every person"; 2) the basic goods can be variously participated in by everyone; 3) the basic goods imply conditions necessary for the effective realization of the basic goods by everyone.[46] Importantly, these conditions quite sensibly include the provision of justice, the rule of law, and legal institutions.[47]

This brings us back to the *integrity of law* . Proper justification of the law is a function of the relationship between the ethical naturalist and non-consequentialist components of natural law theory. As Finnis says, the justification of legal authority and practices "depends...on its justice or at least its *ability* to secure justice"[48] or "derives from [the] *opportunity* to foster the common good" [my emphases].[49] Now, so that we do not imagine a slip into emptiness here, I would say that the points of having *and* valuing certain abilities and opportunities are respectively to use them *and* occasionally at least, to use them successfully. We could not continue to regard highly certain abilities unless they sometimes paid off in ways beneficial to the members at large in the community.

Others have discussed similar conditions, but have shied away from requiring success. For this reason, Philip Soper's obligation-generating condition of an official "good faith effort" to secure the community's interests[50], and Raz's justification-condition of the official "belief" or "pretense"of belief in justice, must also sometimes *really* pay off. But in order to make some sense of this, we must do something that Soper[51] and others seem unwilling to allow, but that Finnis argues is crucial, that is, specify some *content*. That is why the latter argues for the importance of securing *both* a set of basic, common goods justified by ethical naturalism, and a set of legal guidelines or the rule of law, intended positively to aid officials in the exercise of their abilities and opportunities, and negatively to place these efforts too under the constraints of law.

For Fuller, as we have seen, a general notion of human rationality and purpose lurks behind and influences the development of law and the rule of law. Fuller, in essence, argues that Hart puts the cart before the horse. The *facts* of the social existence of law do not speak for themselves and cannot in themselves account for the authority and legitimacy of law. Fuller concludes that it is "because law is a purposeful enterprise that it displays structural constancies." [52] Finnis, carrying this logic forward, fleshes out the sense of human rationality and purpose especially through his specification of the content of human goods. Indeed, he accepts, with acknowledgement to Fuller, the criteria the latter sets out for the rule of law. [53]

Finnis' detailed scholarship suggests that the "eighth desideratum" of the rule of law, Fuller's notion of the "congruence of official action and declared rule", connects logically to and accommodates what seem to be uncontroversial "formal features" of law. How is this so? Finnis identifies the "formal features" as : 1) the injection of stability and predictability into human affairs via the use of rules; 2) the regulation of its own creation through the criteria of validity; 3) the regulation of civil affairs; 4) the use of a unique and independent form of legal justification with respect to the predictability of human actions; 5) the completeness of legal justification and validity in relation to the resolution of practical problems. [54] Let us focus on the relationship between the third and fifth features and the rule of law.

As we have seen, according to legal positivism, legal systems through secondary rules and especially referential rules, supply *covering* rules to practical and moral issues and conflicts arising in the various areas of social life including civil affairs. Problems are resolved *legally* when judges locate and apply general rules to particular situations. Theoretically, general rules are sufficient to cover all the practical problems which arise even if this includes nothing more than specifying in law which institution has the authority to break new adjudicatory paths, and perhaps resort to moral evaluation. Even if it were true that there were sufficient covering laws for every practical problem, we know that there can be a world of difference between utilizing such a rule and actually resolving the issue in a satisfactory way. Problem areas in law or hard cases often arise in the field of civil affairs, as well as perhaps more obviously, over constitutional questions. For example, many morally-difficult cases have arisen between individuals in their civil relations with one another over the issues of abortion and reproductive technology.

That hard cases in law spring from civil affairs is indicative of the relative liberty and legitimacy granted by the law to private individuals and their interests. Further evidence of this, of course, proceeds from the implications of having any recognized civil rights at all. Indeed, law as an institution seems utterly incapable of governing strictly *all* the civil relations persons might have. But if law necessarily grants a modicum of liberty and legitimacy to individuals, then it must assume something about the rational and moral capacities of those individuals and, therefore, it ought to accommodate this presupposition. Most importantly, the institution of law presupposes that citizen-subjects are responsible agents at least to the extent that they can be sensibly and fairly held accountable and sometimes punished by law. Finally, since the law cannot and does not attempt to operate comprehensively and mechanically as a stimulus-response system, it seems incumbent on officials to take these capacities seriously in the context of the mutual relationship between officials and citizen-subjects so well described by Fuller's "eighth desideratum" of the rule of law and evaluated above in the section on procedural natural law. So to reiterate, in this case, we find an additional feature of the *integrity of law* exemplified through closer analysis of the logical and practical relationships between the bare-bones of valid law and morality.

In so far as: 1) secondary rules are incomplete with respect to practical and moral problems; 2) and the principles used to determine the law in hard cases are sourced in rational and moral reasoning rather than in existing secondary rules, precedents or conventions; 3) and law must necessarily rather than accidently serve substantive moral ends; 4) and a necessary part of effective adjudication involves the mutual relationship and moral commitment between officials and citizen-subjects rather than one-sided, official "acceptance", neither the *social fact* thesis nor the *separation* thesis can be said to adequately describe the nature and workings of a legal system.

Maximalists: Rousseau

We now turn, rather anti-chronologically, to Rousseau. But why Rousseau? There are six main reasons which explain why an examination of the thought of Rousseau is important to a natural law critique of legal positivism. First, and perhaps somewhat prematurely, I think we should just take Rousseau's own word as currency here. In the Confessions, he wrote that "the great question of the best government possible...was much if not quite the same nature with that which follows: What government is that which, by its nature, always maintains itself nearest to the laws, or least deviates from the laws. Hence, what is the law?"[55] Second, given Rousseau's great concern to understand the relationship between nature, politics, law, and morality, his thought stands to illustrate the depth of the natural law tradition and explain in an important way why it makes no sense to have a legal theory which does not include necessary connections to politics and morality. Third, Rousseau clearly focuses on the two, arguably the main, values or goods important to natural law theory, *freedom* or we can follow Finnis and say "practical reasonableness", and *community* or following Finnis we might say friendship and the common good. The fourth reason is the flip-side of the third. While Rousseau helps to show the substantive coherency of natural law theory, his thought illustrates the important range of difference too. Fifth, discussion of Rousseau's view of freedom and community in relation to liberal and Marxist views complements the discussions above of the relationship between Utilitarian and liberal views of happiness and Finnis' understanding of happiness in terms of participation in, not pursuit of goods. In relation to natural law theory's critique of legal positivism, this last point is important for understanding the sort of evaluation especially concerning justice and freedom which is unfortunately missing from legal positivism. Sixth, Rousseau explicitly and richly considers all of the features of the *integrity of law.*

I think that these last two points describe the most important substantive parts of this thesis. For before the examination of Finnis and Rousseau, we primarily criticized legal positivist theory in terms of its explanation of the grounds and description of legal institutions and practices. But clear focus on the *integrity of law* forces us into substantive areas of morality. If the criteria of validity are inadequate justificatory devices, and justification in the law instead requires an understanding of basic and common goods, it makes sense to explore the thought of two chronologically-distant natural law theorists who take seriously such notions of good. It should be noted that our main concern with legal positivism does not however drop out of the picture.

The legal positivists we have considered are, politically and philosophically, liberals, and some have been Utilitarians. Logically, there may not be any necessary connection between being a legal positivist and being a Utilitarian or a liberal. On the other hand, there is an interesting coincidence between the fact that liberals generally leave the definition of the good to individuals and the fact that legal positivists do not see law connected up to any moral goods. I would suggest, further, that presupposing, indeed experiencing, the legitimacy of the moral and political conditions of liberalism and Utilitarianism might obscure one's understanding of the various formal and substantive moral inadequacies of legal positivism. Since we, in liberal societies, to this date at least, have not had to worry too much about statist reactionaries pulling in all the reins of power under the ruse of the justificatory sufficiency of valid law, we let the logic of validity and its potentially terrible practical implications off the hook. It is one thing for comfort to breed complacency amongst those who normally do not spend much time thinking about morality, politics, and law, but it is more worrisome to observe this amongst those who do.

Theorists of natural law, of course, do differ with respect to their understandings of human nature and the schedule of human needs this introduces into political, moral, and legal thought. But, generally speaking, natural law theorists draw together around two main features, which clearly distinguish them from Utilitarian and liberal thinking. In a word, I refer to a particular view of common good. This view of common good incorporates both the ethical naturalist and non-consequentialist concerns of natural law theory.

The natural law view of common good can be defined in terms of two features each of which distinguishes it from Utilitarian and liberal views: 1) Common good implies that individuals realize their own goods and interests, grounded in nature or inclinations, *contextually and relationally* with other individuals not independently of them . This means that the social good cannot be understood as a simple aggregate or a sum or a reckoning of individually-defined, pursued, and realized goods. Nor can it refer to the idea that common good equals or is strongly or best served by fostering fair competition or conflict between separate or decontexualized individuals . Rather, individuals and their goods are woven together in a social web or fabric, the wholeness of which itself, constitutes an important common or shared good. Maintenance of the social fabric is important as an end in itself not strictly as a means to the realization of self interests. All of this indicates the importance of the general value of *community* . 2) The contextual nature of the goods to be pursued and participated in further implies a distinctive sense of equality amongst individuals and indicates non-consequentialist values. Individuals are equal *as participants in and beneficiaries of* the common good . The value of and respect owed to individuals attaches to the characteristics which define them as responsible and morally-able beings. Equality is not understood primarily, and as we have seen impractically, as the counting or reckoning of each individual's preference-schedule or utility-level as one and only one; or primarily in terms of an individual's *de jure* status of equal rights or equality before the law in the absence of any serious discussion of power and justice; or essentially, and I would argue obscurely and increasingly impractically, in terms of the provision of equal opportunity.

But anyone familiar with the literature on Rousseau knows that the classification of him as a natural law theorist is highly controversial. Hence, we see the need for the rather lengthy treatment of Rousseau and natural law which follows. In the four subsections below, I first take up the secondary literature while arguing against two, and more or less along with one, of the main interpretations of Rousseau's relationship to the natural law tradition. Second, I discuss Rousseau in relationship to the four structural components of natural law theory showing the senses in which he utilizes ethical naturalist assumptions, and has non-consequentialist concerns, and rejects the social fact and separation theses. Third, I examine his own theory of law or the general will independently, and fourth, with respect to the *integrity of law*.

Rousseau as a Natural Law Theorist

We find three broad positions in the literature on Rousseau with respect to natural law. There are those who argue he rejected the tradition and viewpoint of natural law theory (viz., Colletti [56], Cassirer [57], Levine [58], Melzer [59], and Vaughan [60]). There are those who say Rousseau occupied the tradition but allowed the natural law perspective little if any practical use or merit (viz., Charvet [61] and Masters [62]). Finally, others argue Rousseau adopted the perspective of natural law theory and allowed it general practical value or applicability (viz., Hayman [63], Derathe [64], and Sorenson [65]).

According to the first position, the view that Rousseau is a natural law theorist must be rejected given: 1) Rousseau's alleged radical separation of nature and history which sees humankind developing strictly *in* history which progresses dialectically and, therefore, presupposes conflict and alienation which is inadequately preempted by Rousseau's moral and political solutions [66] , thus indicating a Rousseau-Marx nexus or; 2) Rousseau's emphasis on the achievement of freedom through law by self-legislating, moral agents exercising their free wills responsibly in a republic of ends [67] , thus suggesting a Rousseau-Kant connection or; 3) Rousseau's view that reason is *not* natural to humans in the state of nature and so nature itself cannot be said to apply to civil or political society. [68].

According to the second position, Rousseau saved natural law but attached little practical value to it because: 1) Rousseau's solution for political society involves genuine operation of the general will which itself requires a non-natural foundation. So, it cannot be said to function properly via the force of natural pity and *amour de soi* , or to duplicate in any coherent way natural freedom or independence. As such, natural law is usable only by those in moral positions like those described in the Emile [69] or; 2) Rousseau fails to discuss natural law in the Social Contract choosing to speak of the principles of political right as independent of natural law. This presupposes that natural pity, and self- preservation or natural independence, and even artificial reason are insufficient in political society lacking the effective sanction finally provided to it by Rousseau through the tenets of civic religion. So again natural law is useful only to the few. [70].

According to the third position, Rousseau saved natural law attaching general practical value to it because he manages to model the rational law of the general will upon natural law culminating in the maintenance of the individual's independence and promotion of the well-being of society. This is possible given 1) the theoretical and logical difference between "natural right properly said" and "reasoned natural right" [71] or; 2) the practical and chronologically-sound idea of an "intermediary period" between the state of nature and civil or political society serving to bridge the gap between nature and history [72] or; 3) Rousseau's clear application of knowledge of nature and natural man to political right, and the complementarity between "the end or goal sought by the traditional natural law teaching", the ends associated with the state of nature , and those associated with civil or political society. [73]

That Rousseau's thought filters into many streams including Marxism, anarchism, Kantianism, liberalism, totalitarianism, Romanticism, and ancient Republicanism is testimony to his independent, anticipatory, and critical genius, not a sign of advocacy of any one of them, or necessarily of inconsistency or incoherence. The fact is that Rousseau must be judged substantially in terms of his identification of important moral and social problems and the solutions he offers in relation to them, rather than according to his relative contributions to numerous philosophical paths, or whether he smooths the way better for this or that philosopher-critic. My own view, which I shall defend in this section, is that Rousseau offers sturdy insights into both problems and solutions, and therefore, occupies his *own* philosophical ground. Our judgement respecting the problems and solutions he introduces should consider theoretical and practical merits including soundness of assumptions about human nature, accuracy of identification of moral and social problems and their roots or causes, accuracy of the theoretical linkages between the problems and their solutions, and finally, the practicality of the solutions themselves.

The Rejection of Natural Law Thesis

To begin with, I think the various arguments attached to the first position on natural law and Rousseau are easiest to refute. Rousseau is not a proto-Marxist or a proto-Kantian. Nor do the facts that he allows political society to have a non-natural foundation, or disallows application of reasoned out natural law principles to the state of nature, necessarily imply that Rousseau either failed to establish such principles or failed to use them as models for political right.

Rousseau's thought feeds into Marxism in a number of ways. First and foremost, proponents of the Marxist interpretation of Rousseau emphasize and exaggerate the separation between nature and history or society. The break is permanent and becomes decisive with respect to the now socially and historically-contingent development of humanity. Social and historical factors strongly outweigh natural and ideological, political, moral, and theological categories in terms of the account of human development. Second, they note Rousseau's sharp critique of the institutionalization of private property and the division of labor in the civil or bourgeois society of his own day whereby the human individual becomes alienated as indicated by the contradictory relationship between the *bourgeois* and the *citoyen*. The former indicates only a partial human constitution given the preponderance of selfish interests. The latter is a facade or an empty vessel in practice, to which is given ideological lip-service which covers up exploitation resulting from the one-sided pursuit of self interests and material power. Finally, the argument suggests that the turbidity of Rousseau's thought clears into a Marxist tributary given his focus on freedom in rather than from society especially indicated by the emphasis on substantial equality as a condition of freedom.

No doubt textual evidence can be found supporting all of the points above. So, I will not bother with such reiteration. Rather, I would like to shed some critical light first on the interpretive or analytical method used by proponents of the argument under discussion which suggests arbitrariness concerning some of the conclusions above. Second, I will put forward some strong reasons for rejecting this interpretation based on Rousseau's actual understanding of the concept of freedom.

An undefended presumption is made by, for example, Colletti that both what a philosopher-critic says, and how well or exact or accurately he says it, is strongly influenced or determined by the social and historical conditions existing at the time he says it. With respect to what and how well Rousseau says things, Colletti observes that Rousseau is way out of step ideologically and more importantly critically with his time. [74] But, other times he finds Rousseau's criticisms to be sound. But the basis for the measure of soundness is arbitrary and obscure. Rousseau's critique of alienation in civil society is given high marks [75]. At the same time, his remarks and absence of remarks regarding the social and moral implications of economic and technological change are given low marks [76] .The main reason cited for Rousseau's hits is his "extraordinary foresight", while his misses or the "weakness in logic" in his logic is attributed to "an objective historical limitation inevitable in his times." [77] But here the assignation of significance to historical context in relation to truth and falsehood seems arbitrary. For if extraordinary foresight *can* sometimes unbound itself from the science of history, which is to be given the final word with respect to the subjects under consideration? Specifically, why couldn't someone have extraordinary foresight about the merits or demerits of economic and technological development at odds with the direction predicted by Marxists? Rousseau, at least, is consistent about the way he grounds his own critical judgement as we will see below.

Clearly there are many things about economic change that Rousseau could not have imagined, for example, the way in which money market speculators have achieved a vast and often irrational power over all of us through the electronic mail, or the way in which the capacity of international financiers and capitalists to move investment monies quickly across national boundaries allows them to punish governments, societies, and economic sectors with threats of unemployment, recession, and increased pressures on social welfare institutions. Just as clearly though, Rousseau had some good ideas about how economic expansion occurred and about some of its important social and moral implications. For example, he recognized the significance of appealing to tastes and preferences or "frivolous desires" and so would not be surprised at the expansion of consumer culture. He understood the linkage between military technology or the "invention of artillery and fortifications"and economic growth. He saw that growth in tastes and military technologies contributed to an increase in "public needs" and served to "upset the true economic system", that is, one based on stability between resources and needs. [78] So, Rousseau obviously had some rudimentary idea that modern technological progress promoted economic growth and opened up new vistas of human desires and needs. None of this seems to have impressed or persuaded him of the worthiness of such change. For he was opposed to technological advances which left some humans idle and others overly anxious. Most importantly here, Rousseau had serious reservations about the ability of societies to harness the new dynamics of economic and technological power through political means for the purposes of general improvement.

The "true economic system" he speaks of tracks or parallels the ancient notion of a sufficient community, a notion which retains some value, I think, in natural law theory generally. National economies, like their individual members, must be self-sufficient in the sense of achieving a *balance* between capacities or strengths and needs. One absolutely crucial aspect of this idea for Rousseau is to ensure that unnecessary wants do not become understood as needs. All of us, or at least anyone with limited finances or children, understand the point of this distinction of priorities. However, Rousseau, of course, is making a moral point. For regardless of one's financial wherewithal or the equality of social conditions, Rousseau is suggesting, surely against Hobbes and Locke, and therefore against any advocate of unbounded material progress, that the *continuous* wanting and pursuing of ever newer wants or needs is morally unhealthy. Indeed, we might say that this constant striving confines us to the realm of necessity and therefore leaves us unfree. In a world of ever-expanding choice and goods, we never know exactly what we want, therefore, we cannot know how to get it, and the possibility of a Rousseauan brand of freedom is denied. Wanting and getting are moral problems for

Rousseau because of their relationship to the power of pride, vanity, or *amour propre* . The latter is the singular cause of moral inequality which becomes seriously exacerbated once material wants expand. Unfortunately, Colletti and others fail to address this central feature of Rousseau's thought especially its implications for class conflict. For these reasons, Rousseau cannot be said to be smoothing the road for Marx. Neither does this make Rousseau necessarily a *petit bourgeois* .

There would seem to be plausible reasons for thinking that Rousseau's ideas compare favorably with Kantian moral philosophy. For example, he clearly rejects Hobbes' explanation of the nature of reason as a means-end or instrumentalist operation rooted in a psychology of desire. Instead, Rousseau does focus on the importance of using the rational will, *via* the general will or law, to achieve an end-state of moral autonomy or freedom. We might even cite Kant's own authority here. Kant wrote that: "Rousseau set me straight", and that he was possessed of "an uncommonly acute mind, a noble sweep of genius"and that, "Rousseau first discovered amidst the manifold human forms the deeply hidden nature of man." [79] But there are problems with this view. Again, I will provide first some criticisms of the analytic method employed by those who think Rousseau was preparing the ground for Kant. Then I will make some critical observations about the important differences between Kant and Rousseau.

Some writers seem to assume again that historical and social conditions must strongly define the ideas we can have about them. Obviously, there is a point here. For there is surely some truth in saying, as Levine does, that "with the emergence of bourgeois society...political theory in the west has been largely a matter of the growth, consolidation, and transformations of two largely confounded, but conceptually incompatible, tendencies to which...we can attach the names Hobbes and Kant. [80] It is, however, unfair to automatically excuse a person's alleged misreadings of Rousseau on the basis of some "natural" conflation of the tendencies above [81].

But there is a more serious problem which arises from the interpretation of the nature of reason. Both Levine and Cassirer define reason as a categorical operation. [82] Reason is defined in very strict terms as an operation which both formulates general or universal principles or laws and *instigates* actions required by these laws. The formulation of general or universal laws defines rational behavior. The mandatory actions required by them and performed in accordance with them define ethical or moral behavior. Agents are understood as rational because they can and do recognize *law* as the supreme and most sublime human achievement possible. Perhaps the greatest difficulty here, or at least the one that seemed to concern Rousseau the most, concerns the distance between the formulation and instigation of rational and moral actions.

As we will see below, Rousseau seems quite clear about his position that reason cannot motivate moral actions *independently* but requires the aid of the sentiments. Unfortunately, Cassirer's discussion of this relationship is not always clear. For example, he writes while interpreting Rousseau that, "principles of ethical conduct...possess their own kind of 'self-evidence'...this self-evidence, however, is no longer that of feeling but that of reason. [83] Later, complementing this notion, he writes that, "the bond connecting man with the community is 'natural'- but it belongs to his rational [social] nature, not his physical nature. It is reason which *ties* this bond and which, *out of its own character*, determines the nature of this bond. " [my emphases] [84] But in between, Cassirer suggests that Rousseau bridges the gap between reason and sentiment by raising "feeling...far above passive 'impression' and mere sense perception, [by taking] into itself the pure activities of judging, evaluating, and taking a position ." [85] At this point reason and sentiment are conflated and a serious disservice is done to Rousseau.

As mentioned above, Rousseau doubted that the individual's capacity of reason could motivate moral actions . But perhaps the point can be made in a slightly different way. Rousseau's notion of law as the *general will* is not the same as Kant's notion of law as the *categorical imperative* . The general will is the will of a *particular people* , whereas the categorical imperative is meant for *all rational individuals* everywhere. Notably, while Rousseau approvingly allows that particular peoples might come to recognize a form of a universal duty of man, he was most concerned about rejoining *l'homme* and *le citoyen*. Indeed, the recognition of the universal duty of man seems contingent on the prior elimination of this aspect of alienation. Rousseau is not a cosmopolitan. Proper government presupposes politically-relevant differentiation between peoples not what may boil down to bourgeois uniformity . [86]

Most importantly, what motivates particular peoples toward moral actions is different from what allegedly motivates *all* rational individuals. There are indeed aspects of the social bond which qualify as rational, for example, equality, generality, and mutuality. But what *holds* the rational features together, and *moves* the rational will , for example, love of one's country, or satisfaction of participation in tangible common goods, or communitarian or fellow-feeling, is rooted in sentiment not some rational recognition of an abstract and universal republic of rational agents, or recognition of abstract duty in relation to this republic. When reason and sentiment are conflated together, we risk failing to observe the rational connection Rousseau establishes between nature and morality, which in turn, establishes him as a natural law theorist.

Those who argue that: 1) Rousseau dismissed the idea of natural law because he excluded morality and reason from the state of nature and, 2) therefore lacked a natural standard by which he could judge civil society, certainly have a mass of textual evidence against them. Time and time again, Rousseau claims that one can learn from nature. Indeed the entire lengths of the Discourse on Inequality and the Emile are premised on this assumption. Still, Melzer argues that the idea of natural law for Rousseau was "false" and "non-existent", and that it follows that the general will is "juristic", "arbitrary", and "coercive". [87] Likewise, Vaughan argues that because there is no reason or natural law in the state of nature, Rousseau swept away the idea of natural law "root and branch". The only thing that survives of the notion is its name. Its content is understood by Vaughan to refer to the "common sense of justice" which evolves slowly in civilization and "necessarily varies from age to age. " [88]

The first thing to note here is that no less an undisputed natural law theorist than Aquinas supports and argues for principles of natural law not insubstantially on the basis of non-moral and non-rational nature. At least something significant about moral right and good depends on what can be learned about the basics of survival and the integrity of sensual existence which humans share with *substances* and *sensual beings* respectively.[89] Secondly, while it is true that Rousseau excluded reason from natural individuals in the state of nature, he did attribute two rudimentary "moral" attributes to them, namely "perfectibility" and a capacity for "free will".[90]

In addition, soon I will argue that Rousseau identified natural pity and independence or *amour de soi* for the purposes of supporting the natural law principles of freedom and community. Compassion has clear social advantages. That it can be construed plausibly as *natural*, or as an inclination, simply provides some justification for attempting to supply or set up the conditions or occasions for its operation in society. Natural independence or *amour de soi*, on the other hand, serves both as an inclination and straightforwardly as the source of the general principle of human freedom. Because of these ideas, I think Rousseau stands in the natural law tradition.

In any case, it should be clear that the conclusion that no natural law standards or principles follow given the absence of reason in the state of nature, itself does not follow. What such critics should be arguing is that natural law standards drawn from non-rational nature are perhaps inadequate or impractical or insignificant for any number of reasons, not that they do not or cannot exist because nature is not animated by reason. Indeed, this is the general view of those proponents of the second interpretive position of Rousseau's relationship to natural law. To these critics we now turn.

The Political Irrelevance of Rousseau's Natural Law Thesis

I take up the two main proponents of the view that Rousseau's relationship with the natural law tradition is positive but weak, given its limited practical applicability, starting with Charvet. Charvet's examination of the "social problem" in Rousseau's thought surely is profound, and I think most valuable in illustrating how or why the interpretive issue concerned with understanding Rousseau as a liberal versus Rousseau the totalitarian became controversial in the first place. Charvet's criticisms of Rousseau's arguments in the Discourse on the Origin of Inequality , the Emile, and the Social Contract are relentless and often at least plausible. The conclusion he draws is clearly stated, in the most appropriate and natural place given his critical salvo, in the last paragraph.

Charvet thinks that Rousseau's theory is impractical and incoherent because he rejects the importance of "particularity" in moral and social relationships. Particularity is important according to Charvet because it is "the source and content of the mutual affection which alone can, without tyranny, hold both small and larger groups of men together. "[91] But while the role of particularity clearly does seem important in relation to social cohesiveness generally, it is also important to note that part of Charvet's conclusion too is controversial. Rousseau and others would doubt the contention that *larger* groups of individuals can be held together on any firm or properly moral basis at all. At the same time, he would agree that the social bond ought to be accomplished "without tyranny".

I agree that Rousseau thinks particularity or the idea of an intersubjective, intimate, and intentional relationship between individuals, is a problem because it contributes to dependence, competition, exploitation, and alienation. I do not agree that his solution involves eliminating *all* particular relationships between individuals. Apart from my disagreement with Charvet's main conclusion, I disagree strongly with his view that Rousseau abandons natural law criteria in the solution he develops especially in the Social Contract, thereby rendering natural law impractical in most cases. In Charvet's view, Rousseau assumes an"irreversible break" between nature and the development of social or moral relations and consciousness, and this then closes off the option of finding very useful or *practical* natural motives for the development and operation of moral and social consciousness. According to Charvet, it is Rousseau's determination to cling to natural pity and independence which forces him to abandon particularity in the end.[92] My critical comments here focus on Rousseau's understanding of the relationship between nature and society and the role of particularity in society. I think that Rousseau does not assume an "irreversible break" between nature and society, and can allow for more substantial social relationships than Charvet imagines.

The state of nature is characterized by Rousseau as an environment constituted by individuals who live within themselves, or fully for themselves, or at a level of independence or self-sufficiency given the balance achieved between their desires and their strengths. Society, though, is populated by individuals who having achieved a self-reflective state of consciousness which contributes to the tendency to live outside of themselves. Individuals understand themselves on the basis of what they think other people think of them, or on the basis of social norms of prestige and status. In combination with competition for and resulting inequalities of wealth, serious levels of dependency and alienation occur. Inequalities of status and wealth are driven by the corruption of *amour de soi* , or the natural form of love of self, by *amour propre* . The latter can be defined as the self-love which exists in the world of opinion and reputation. It concerns the sense of self which in very important ways is *not* in direct control of the individual because it is a product of what others think about the individual and what the individual thinks about this. But still the individual comes to have a stake in protecting this *artificial* or social self. These protective efforts seem to be motivated by Hobbesian terms of fear and glory which result partly from conditions of scarcity and inequality, and partly from the institution of society or social complexity itself.

According to Charvet Rousseau understands the corruption of *amour de soi* , *amour propre* , or the generation of "competitive self-concern" to arise out of "the making of comparative evaluations." Because of this, Rousseau's resolution of the "social problem" must involve exclusion of comparative evaluation.[93] Thus, Rousseau "appears to leave us with the choice between complete determination by others or complete self-determination, between an unqualified dependence and an unqualified independence."[94] Now I think this is a misreading, or at least an exaggeration of Rousseau's position. For behind the achievement of self consciousness which entails the making of comparisons with others, logically, there must be present certain desires, inclinations, capacities, or motivations *and* occasions to begin reflecting upon oneself, *and* the differences between oneself and others in the manner suggested above. But which of these general preconditions is logically prior and more forceful seems uncertain. Are occasions sought out or do they present themselves to individuals? I think Rousseau quite clearly opts for this latter explanation when he talks of the "fortuitous concurrence of several foreign causes"[95] as providing the initial step out of the state of nature.

Since, as we will see, Rousseau allows that comparative evaluations could be made in the state of nature without engendering *amour propre*, and in primitive society itself without engendering serious levels of *amour propre*, Charvet can not be right that the making of comparative evaluations itself is the culprit. For there must be something, that is, some important differences for individuals to compare in the first place. In other words, we must look at motivations, occasions, and difference as explanations of *amour propre*, not just to the making of comparative evaluations itself. Some of these conditions, such as the possibilities for independence, equality, status, and wealth, might be limited, and thereby, narrow the range of comparative evaluation without eliminating it altogether. So, we can not agree with Charvet that "the possibilities for a reformed social man must involve an existence for others which yet excludes the making of comparative evaluations" or the absolute "denial of the importance to oneself of others as centres of consciousness in which one exists."[96]

As a natural law theorist, Rousseau can not assume an "irreversible break" between nature and society. Rousseau's tentative description of the very gradual movement from the state of nature to society, and his obvious wish to teach individuals something important about human nature preclude the possibility of taking such an extreme stand. If we have a capacity to learn from Rousseau, which must have been assumed by him and continues to be assumed by this and any serious student of political theory, we must not have moved irreversibly away from nature as Rousseau understands it. I think the schematic view below of Rousseau's understanding of the relationship between nature and society helps to illustrate the points I have been making above and to clarify the continuing analysis of the coming sections:

Fig. 8-2:

State of Nature -- **Society**

independent individuals differing in natural (physical/mental) inequalities whose social contacts are few, unplanned, and temporary and whose natural characteristics include:
-amour de soi (most active principle)
-pity (second most active principle)
-perfectibility (latent/potential)
-free will (latent/potential)
-sensuality (level of experience)

| dependent individuals differing in natural and moral or social inequalities (status and wealth) whose relationships are planned and more permanent and are animated by:
| -reason
| -interests
| -rights, duties, norms
| -amour propre

"fortuitous concurrence of several foreign causes"
-perfectibility
-scarcity/competition
-geo-economic differentials/economic specialization
-natural disasters
-needs

Main Moral Implications:

1. Natural, non-moral goodness of human nature used as a model or framework for the development of moral relations.
2. Society constituted of a variety of corrupting influences and institutions.
3. Politics (and law) as the effort to bring nature and society into balance with each other.

Now the points I have made against Charvet and continue to develop below are that:1) There is no decisive, irreversible break between nature and society; 2) Rousseau's approach to the tension between nature and society is not an "all or nothing" approach with respect to the particularity of human relationships; 3) Comparative evaluation is not so much a problem in itself but difficult because of the kinds of differences which develop between individuals in society.

The relevant moral knowledge gained from examination of the state of nature involves the ideas of natural independence and pity. These ideas are best thought of as inclinations. They must be capable of informing some practical principles or Rousseau can not be said to be a serious natural law theorist. Charvet argues that since *amour de soi* disappears when it is overwhelmed by *amour propre* in society the only relevant motives Rousseau can work with are pity and especially the selfish ones [97] .Further, he argues that Rousseau corrupts or changes pity to such an extent that it retains little motivational force for most individuals [98] . More importantly, Rousseau *must* corrupt pity according to Charvet, because particularity must be eliminated given the alleged decisive break between nature and society accomplished by the making of comparative evaluations.

The alleged the "break" between the state of nature and society is uncertain and gradual. No doubt we can not return to nature. Even if we could there probably are not too many reasons why we should . But Rousseau does not speak of all social forms as necessarily and hopelessly corrupt. As a matter of fact, he speaks of a particular, albeit, simple social form as exemplifying a "just mean" between the state of nature and bourgeois society. [99] His works on Corsica and Poland seem to assume at least the practical possibility of improvement. [100] In addition, when he speaks directly to his readers in the introduction to the First Part of the Second Discourse , he does so in a way which seems to assume a relevant attachment to the past or to nature. [101] As we will soon see, the notion of natural independence, or the idea that freedom involves harmony or balance between abilities and desires or needs, has a certain *psychological appeal* to it, especially for those individuals caught up in and confused about life in bourgeois society. If I am right about this, I think it indicates the reality of a certain associated inclination which does not die and might retain some practical relevance in society. Experience of alienation might invite reflection upon its meaning and origin, and in turn could involve recognition of the importance of the idea of Rousseauan freedom.

Turning briefly to the problem of pity, natural pity stands first as a general revulsion to pain. Further, as we will see, under the proper conditions, it can both temper self-preference and take up occasions whereby it can be extended to others, and therefore it can be understood as capable of binding groups together. This sort of bond does *not* result in any serious form of dependence. At the same time, we might question its completeness as a means toward social unity. Now I do not see any reason why these experiences relating to natural pity and independence and their associated trains of reasoning would not be available to the sorts of individuals Rousseau considers in the Emile or who might be a part of a Rousseauan social contract .

Arguably, Rousseau may restrict particularity too severely and so, pay insufficient concern to its relationship with moral and political theory as Charvet suggests in his conclusion. But this is not what Charvet argues. He argues that particularity must be abandoned in favor of the absolute independence of the individual (allegedly exemplified in the Emile) or absolute, non-particularized dependence of the individual upon the "general will" (allegedly exemplified in the Social Contract). But the *only* parties or "partial societies" Rousseau expressly bans in the Social Contract are those whose *corporate* interest hinders genuine expression of the general will. Most commonly, these include political parties and lobby or interest groups. What democracy there is, therefore, must be direct. On the other hand, as we will see below, Rousseau considers, no doubt as a last expedient, a Federalist-like answer involving multiplication and therefore dispersal of partial political societies.[102] In other writings, Rousseau talks of the political importance of partial associations for the development of community in society at large.[103] So there does not seem to be any reason for excluding particularity from the solution given in the Social Contract assuming that individuals can keep themselves from crossing into divisive political speech, or more importantly action, in their particular associations. In good part, it seems that this possibility will be a function of how well common interests are felt and met.

Social circles constituted by particular relationships in the Emile are admittedly sparse. Generally speaking, the sort of relationship Emile has or develops with other individuals is one of benefactor to beneficiary. As I suggested in the last chapter, this sort of relationship does not conduce well to the development of mutual respect. One of the reasons why it does not surely has to do with the avoidance of "centers of consciousness". But with regard to the level of particularity defining the most important social relationship in the Emile, Charvet himself equivocates. In describing the dynamics of the relationship between Emile and Sophie, Charvet says that: "They do not mean *anything* to each other in terms of what they can offer each other from the resources of their actual [particular?] qualities. The meaning for each other is what each creates for himself out of his own imagination ." [my emphasis][104]. A little later Charvet equivocates when he writes, "It is clear, then, that Emile *is* to have relations of affection and attachment to others...he has to preserve himself from engaging himself in the relation in such a way as to open himself to being *deeply* affected and disturbed by what happens in them. " [my emphasis][105] Unless one can have a relation of "affection" with someone on a non-particular basis, that is, in a way unaffected by qualities sourced in or constitutive of the *other* particular person, it seems that particular relationships have a place in the solution developed in the Emile.

Are the particular associations Rousseau does allow sufficient in numbers? Do or can they contribute substantially to the strength of the larger political community? Is pity the best inclination to tap in relation to the formation of particular associations especially considering their relationship to the larger political whole? Does Rousseau treat pity or even independence adequately in terms of its role in the life of social groups? I can see that there are good reasons for doubting the fullness of Rousseau's treatment of these questions. I do not, however, consider such objections to be crucial to the defense of my own thesis here that Rousseau is a serious natural law theorist based on the practical and rational connections he establishes between natural inclinations and moral principles. For it seems clear that the notion of natural independence can be described as an inclination and desire, and that it can contribute to the development of a meaningful, though perhaps formal, moral principle. Further, it seems clear that pity, as an initial and general revulsion to pain whose wider practical operation depends on the availability of appropriate conditions, strongly attaches to underlying inclination, and as such could form the basis of at least some partial associations *not* superfluous to the strengthening of the wider political community. Because of this, it is hard to understand what exactly Charvet means by the corruption of pity since Rousseau never wavers from his original definition of it in the state of nature as a natural revulsion to pain.

I said above that Charvet shows us why the controversy in the literature between Rousseau the liberal or Rousseau the totalitarian continues to be relevant. The *logic* of Rousseau's solution, as Charvet points out, involves movement away from dependency or subjection to the will or opinion of other individuals to some sort of *state* of freedom. Even though the logic can move toward absolute independence or toward non-particularized dependence, Rousseau does not take it to either extreme. In the Emile, independence partly involves substitution of a *common* attribute of particular individuals (i.e., suffering) for intimate, affectionate relations between two or more but always a small number of individuals. In the Emile then, relationships of particularity are replaced by a general form of relationship defined in terms of benefactor and beneficiary though other more intimate and particular relationships do survive. This general relationship seems to be the most important moral relationship discussed by Rousseau. In practice, Emile resigns himself to the *fact* of common or general suffering, but does not neglect his duties to help those who can be helped by him. Thus, we can see the practical intersection of independence and pity.

In the Social Contract, independence involves substitution of dependence on the "general will" for dependence on particular wills. Sometimes, in both the Emile and the Social Contract, Rousseau does seem to stress a liberal or "abstract" or "pure" sense of individuality. Charvet claims that Rousseau assumes that such an individual "need only will a law in his *own* interest under [the condition of equal voting rights], and in doing so he wills the interest of all others at the same time. " [my emphasis] [106] The connection to liberalism becomes apparent when we recognize that *all* individuals everywhere can be thought of as "pure" and "abstract" in terms of their *equal* relationships to each other under law and as citizens . In this context, particular dependence is avoided on the condition that everyone is equal and equally free in the eyes of the law.

This of course ignores, as Charvet seems to recognize, what Rousseau says about the importance of voting *for* the common good rather than one's own self interests. More importantly, it ignores the conditions through which Rousseau thought this intention might be ensured, that is, various voting procedures, small population size , rough material equality, and cultural homogeneity. It is especially out of this last condition that the totalitarian thesis emerges. For Rousseau recognizes and supports the idea of the cultural particularization of a people . [107] In this context, all individuals share the same, particular interest in maintaining their particular identity as a *people* and thereby, avoid dependence on any particular individuals. Rousseau intends his solution in the Social Contract , though, to involve a mixture of individualism and communitarianism This resolves the liberal-totalitarian controversy. Rousseau does not want to , nor thinks it desirable or even possible to remove the particularity from all relationships between individuals. In his own words, he writes that: "The second relation [important to consider with respect to the classification of law] is that of the members to each other or to the entire body. And this relationship should be as small as possible with respect to the former and as large as possible with respect to the latter." [108] Rousseau does not say that *civil* relationships should be made impossible . Indeed, he argues sensibly that there must be laws regulating their existence.

I think Charvet's entire argument about particularity, and the corollary regarding the impracticality of natural law, depends upon the idea that there is a clear break between the state of nature and society and that the making of comparative evaluations constitutes that break. Given: 1) as we soon see, that comparative evaluation can take place in the state of nature *without* engendering dependence and recalling the fact that comparative evaluation in society need not result in serious forms of dependence; 2) Rousseau's tentative and cautious descriptions about development in the state of nature and society; 3) his explanation of the transition between them in terms of occasion-providing accidents ; 4) the slow emergence of competitive self-consciousness because dependent on the uncertain succession of "ideas and feelings" [109] ; 5) his preference for the Golden Age or the "just mean" between the state of nature and society; 6) and his willingness to incorporate some particular relationships between individuals into his solutions, there can be no decisive or clear theoretical break-point between the state of nature and corrupt society. Because of this, Rousseau can appeal to natural inclinations as bases for natural law principles, and can do so consistently and with justification.

Masters concludes that there are two, in the end contradictory, Rousseauan teachings, only one of which maintains a significant, though weak, association with natural law theory. Briefly, the Social Contract "proposes a solution for man's political debasement", while the Emile "provides some men with an eternal claim to reject [the first solution]". The latter maintains a tie with natural law through the role of natural pity and a conscience sensitive to this sentiment, while the former severs ties with natural law and founds morality on "independent" grounds [110] . The focus of my discussion will be on Masters' interpretation of the Social Contract since I think that what can be established here only strengthens the weak connection he admits to hold with respect to the Emile. Here, I first point out a number of instances where Masters equivocates regarding the *independent* status of political right, and therefore, about its relation to natural law. Second, I straightforwardly argue how natural law and natural right feed into the meaning of the principle of political right.

Masters not only equivocates about the independent status of political right, but he is also unclear about the substance of the principle itself. Clearly, it must be the latter which determines its relative relation to natural law. With regard to the independence of political right in relation to nature, Masters says, "It is...the logic of law [i.e., the general will] in the abstract, discovered by Rousseau's analysis of right, which explains the origin of justice" [111] , and a "man-made logic" accounts for the legitimacy of the political body, the integrity of the social bond, and "political obligation." [112] Perhaps, understandable so far. On the other hand, he writes, "natural right is a criterion which permits criticism of political society, but only from the outside as it were" [113] ; and "the principle of legitimacy is enforced by an unlimited right of revolution" [114] ; and finally, "Rousseau's logic presupposes rigorous equality in terms of right". [115] It is this last quotation which seems the most question begging given the reference to "logic". If the logic Rousseau describes as attaching to law "presupposes" equality, the logic *itself* cannot constitute an "independent" foundation for morality. Further, the *substance* of the principle of political right is now called into question.

Masters describes the substance of the principle of political right or the general will, in various terms including as "the rational principle that inheres in all political communities"[116], or as a "highly voluntarist formulation of the traditional conception of the common good"[117], or other times as a "formal requirement"[118], or as a device "intended to introduce a certain element of rationality into the wills of all citizens".[119] What we gather from the above is that the general will is formulated on the basis of some understanding that Rousseau has of the *rational will*, and that this understanding differs from so-called "traditional" ideas of the natural law, and other modern conceptions of natural right.

Now Masters seems to suggest that Rousseau's conception differs from the traditional view in the sense that the latter founds natural law solely on that right reason available only to the *few*, who themselves are capable of motivation by reason alone, and therefore, capable of the most disinterested and enlightened formulation of the common good. Suffice it to say that the interpretation of what constitutes the *traditional* sense of natural law is itself controversial. For example, as we have seen, no less a tradition-oriented natural law theorist as John Finnis argues that *all* individuals have need of a rational or coherent plan in their lives, so that they can work toward their ends effectively.[120] We can infer from this that all individuals must have sufficient capacity to lead their lives in this rational sense. More importantly, the natural knowledge-base presupposed by this practical principle must be available to all. That is, all must have the capacity to confirm the relevant practical principles for themselves, since, according to Finnis, the "evaluative substratum of all moral judgements" is common to all.[121] I have already suggested ways in which Rousseau's ideas differ from some other conceptions of modern natural right. The primary difference is that Rousseau, contrary to many modern theorists, does not identify reason as natural in a state of nature. Supposedly, this denies Rousseau the strongest of bases for the rational criticism and defense of human freedom especially as it relates to individuals.

I think that much of Masters' equivocation about the relationship between political right and natural law stems from a failure to allow the proper distinction in natural law between the *effectiveness* of precepts and the *source* of natural law precepts. He writes: "Natural law cannot be logically and historically prior to civil society for the simple reason that civil society is historically and logically prior to the natural law." [122] Now this must be a misinterpretation of Rousseau since the latter often says that natural law cannot be "founded on reason *alone* . " [my emphasis] [123] It must be founded on sentiments *too* , since these account better for the motivational side of natural law precepts. Again, Masters recognizes this [124] , but does not square it with the quotation above which appears seven pages prior.

If we can distinguish logically effectiveness from source, then in so far as Rousseau constructs natural law precepts based on knowledge of the state of nature, such precepts or the epistemological *sources* of them are logically and historically prior to civil society. That is, some of the important knowledge we can have of natural law is derived from pre-social, pre-moral, or natural sources. Obviously, society provides the occasions for natural law principles to operate in a *fully* normative sense. But it makes no sense to suggest that the knowledge-base of such principles itself does not constitute an irreducible *part* of the normative sense. So, in truth, this places the idea of a natural law precept in a logically and historically-ambiguous position with respect to civil society. Rousseau himself makes just these distinctions when he refers to natural law as it operates in the state of nature as *droit naturel proprement dit* , and as *droit naturel raisonne* as it operates in society. But again, Masters does not discuss the implications of this distinction. [125]

This distinction supplies the main reason why the principle of political right cannot be understood as independent of natural law. For the full senses of Rousseauan freedom and community filter through three separate but related theoretical levels. At bottom, these standards are informed by natural law or precepts based on arguments about the moral and political relevance of natural inclinations , intermediately they are touched by the rational and voluntaristic terms of the general will, and finally they can be colored by Rousseau's political science, that is, the "maxims" he develops in many parts of the Social Contract. I focus here on the first two levels.

The "logic of right" presupposes more than just a procedural or "formal" equality between citizens as voting members of the political association. And the proper senses of freedom, community, and the common good require more than just the absence of "brute force" plus voting equality for their establishment. [126] When Masters interprets the relationship between political right and nature, he abstracts and formalizes artificially the terms discussed immediately above in a way that tears them out of their natural context. That natural law and natural right in fact help to describe a sense of "rigorous equality" is best seen in Book I of the Social Contract where Rousseau argues against other ways of justifying or legitimizing political rule.

From Rousseau's discussion here, we can see that legitimacy and political right are more closely related to natural equality than Masters seems to allow. Everything Rousseau argues in this section presupposes the relevance of the idea of natural independence whereby all the individual's actions support the self preservation of that individual. From this we can say that individuals have a capacity to preserve themselves, and this involves the familiar notion of maintaining a balance between strengths and needs. For example, when Rousseau says in Book I that there can be no natural right to "immense possessions in land", he is referring to the presence of certain natural *needs* . When he discusses the idea that one ought to possess land "by labor and cultivation", he is referring to certain natural *strengths* or abilities. Likewise, when he talks about the illegitimacy of "conquest", or the inability of prior contracts of one's predecessors to bind oneself, he is referring back to the notion of a self-preservative *capacity* .

The connection between the rational and voluntaristic terms of the general will and these natural needs, strengths, and capacities is easy to see. Briefly here, since we discuss these ideas in more detail in the following sections, the main rational features are equality, mutuality, and generality. Equality, in the context of the operation of the general will, refers principally to voting procedures and equal rights. Mutuality refers to the social-contextual nature of the general will whereby what individuals do as citizens affects everyone as subjects. Generality refers to the idea that laws themselves are binding on all individuals, and to the idea that laws must have general rather than particular objects.

The voluntaristic side of the general will includes three terms all of which establish a connection back to natural law and natural right. Together, this relationship is very strong. First, Rousseau supposes that we have capacities, however difficult they may be to activate, to will the common good. Such capacities are presupposed by Rousseau's formulation of the terms of questions for consideration by the sovereign people. [127] Now a connection back to natural law is established when we see that both natural law and the general will aim first at securing the common good.

Second, Rousseau argues that the will cannot harm its bearer. That is, under the proper circumstances of relevant information, a level of attitudinal seriousness, and freedom from severe want and other forms of pressure, individuals would never choose to be unfree. If these conditions can be met, then it can follow that the "the *general* will is always right and always tends toward the public utility." [my emphasis] [128] Just as freedom cannot be alienated, neither can the will. What affects the one, affects the other. So, when Rousseau talks about the will not harming its bearer, he simply invites us back to consideration of that *balance* between needs and strengths which defines natural freedom.

The third voluntaristic feature of the general will is the idea that the general will itself constitutes the most important, though as we have seen not the only, part of the social bond. In what sense can will or the deliberative faculty hold communities together? Three further ideas are important here. A strong relationship between will and social bond presupposes that individuals take their duties as citizens seriously, meaning that they recognize the importance of their duties for other citizens. In other words, citizens see a common interest in deliberation, or in thought which is intent upon taking action, about public matters. Second, there must be a positive connection between the products of willing for the common good and their valuation as benefits or advantages. This introduces the third concern, since in the end it is the individual who does the valuation and therefore has a stake in it. In Rousseau's view, valuation is most sound when it secures basic and common desires and interests. So again, we find ourselves directed back toward the idea of natural freedom as the key measure of the value of common and other goods provided by the general will. Do proposed common goods secure a balance between abilities and needs for all?

Together these points provide strong reasons for rejecting Masters' view that the standard of political right is independent from natural law. In addition, if we can speak of an historically-static, common psychological stream coursing through the myriad social and institutional changes visited upon human beings in history, and grant individuals the capacity to use natural law principles as Finnis does, we can reject Master's view that natural law is only available to the few who are most wise.

The Political Relevance of Natural Law Thesis

What ties theorists of the third position together are assumptions about the central importance of freedom for Rousseau and its basis in nature and natural law. For example, according to Hayman , "The idea of human liberty from which Rousseau draws all his arguments in the final version of the Social Contract is not an historical fact which could be disproved by other historical facts, but it is a gift given to man through the natural law." [my translation] [129] So, the analytical effort of this position focuses on establishing the nature of the relationship between freedom and nature. A variety of arguments are made, many of which I have put forward in this section, though I hope in an original, well-considered, and often more detailed way.

Hayman also emphasizes the possibility that given the slow progression of development from the state of nature to society, rudimentary ideas of justice might emerge prior to the formation of *any* social pact. The emergence of such ideas then could be attributed at least in part to natural sentiments. [130] Derathe, while agreeing with the above, also suggests the importance of "perfectibility" as a logical link between the state of nature and society. [131] As well, he also draws attention to the linkage Rousseau assumes between *droit naturel proprement dit* and *droit naturel raisonne* or natural right properly said and reasoned natural right. [132] Sorenson emphasizes the importance of the coincidence of ends between traditional natural law teachings and Rousseau's arguments, that is, to the idea that both aim at achieving the self-preservation of individuals and the common good in community. [133]

I think my own arguments establish the connection between nature and morality in a more clear way, and are more true to the particulars of Rousseauan freedom. Put succinctly, Rousseau, as we will see, argues plausibly for the practical and rational significance of a psychological bridge between the experience of alienation in present-day society and the idea of natural independence, and the direction of these experiences leads toward a presumption in favor of the idea of a certain balance between strengths and needs. As such, his natural law principles of freedom and community serve as important critiques of both liberalism and Marxism. This critical function seems to go unnoticed by the writers in the interpretive position under present consideration. Rousseau wants to preserve individual autonomy and freedom but not at the expense of meeting the expansive needs assumed by liberals and Marxists to define freedom itself. The lack of attention to the details of *Rousseauan* freedom by many of these writers suggests that Rousseau is best understood as more liberal than totalitarian, or more liberal than Marxist. I think this misses the thrust and political relevance of Rousseau's natural law principles. I discuss these ideas more in the followings sections and chapters.

Ethical Naturalism and Non-Consequentialism: Freedom and Community

Now Rousseau very clearly and consistently argues just according to the ethical naturalist line of reasoning outlined above in the discussion of Finnis, and in the previous chapter. In the Second Discourse and the Emile, he identifies two basic inclinations, self-preservation or natural independence (*amour de soi*) and pity (*pitie*). In the Social Contract and the Emile, he identifies two corresponding natural laws or moral principles, namely, the importance of achieving moral freedom and the need for community. In all three books he provides reasons for accepting these principles, thereby developing the rational connection between nature, law, and morality. These major works are consistent with respect to these major themes.

Early in the Second Discourse, Rousseau writes, "but so long as we do not know natural man, we would try in vain to determine the law he has received or that which best suits his constitution."[134] Here, Rousseau implicitly criticizes Aristotle and Pufendorf who argued that humans are naturally sociable. On the other hand, he has in mind Hobbes' mistake whereby he failed to reach far enough back into nature. The consequence of Hobbes' mistake was to overlay *social* characteristics, for example, "competition, diffidence, and glory", onto *natural* individuals. For Rousseau, individuals in the state of nature are neither sociable nor competitive, fearful, or glory-seeking, but are equal with respect to natural independence.

The philosophical task of discerning human nature is, of course, uphill work. Rousseau does not make the work any easier when he says that the knowledge of the natural state is "the most important knowledge of all"[135], yet, it is a state "which perhaps never existed, which probably never will exist."[136] If the state of nature has "perhaps" no chronological existence what is its point? Before answering this question, let us be clear that Rousseau is not resigned to the impossibility of locating the state of nature in some other meaningful way. For he suggests another way of lending plausibility to the concept of the state of nature. He offers a psychological test which he hopes will evoke in his readers at least a willingness to reflect on the reasons why many individuals experience a certain dissatisfaction or emptiness with respect to the pace and quality of modern, bourgeois life. He writes, "There is, I feel, an age at which the individual man would want to stop: You will seek the age at which you would desire your species had stopped. Discontented with your present state for reasons that foretell even greater discontents for your unhappy posterity, perhaps you would want to be able to go backward in time."[137] Rousseau has in mind common experiences of the "extreme inequality in our way of life", "excesses" and "immoderate ecstasies", the potential loneliness of the "state of reflection", and the "exhaustion of mind" resulting from the effort of trying to make sense of all these "afflictions."[138]

By tapping into this psychological stream, Rousseau hopes to convince his readers that such ills occur when humans stray away from their natural constitutions, that is, a balance between abilities and needs. Many political theorists have argued that alienation or estrangement is of fundamental importance to our understanding of human nature and moral possibilities. So, Rousseau seems to be on solid and well-trod ground. The relevant points, of course, concern whether or not he is right about its sources, or at least if he can establish a reasonable case for them. Rousseau argues that alienation is rooted in the relationship between social organization and pride, and that increasingly complex social relationships provide increasing occasions and opportunities for the exaggeration of self-esteem into vanity and arrogance. While Rousseau does suggest that the sorts of social and economic relationships which increase opportunities for achieving status and wealth and other wants constitute the worst examples of how excessive pride becomes a problem, he also seems to argue that any social organization or hierarchy draws out or promotes these difficulties. *Complex* society or social organization itself is corrupt or has a corrupting influence on human nature, especially on the natural inclination toward independence. If I am right about this then we have in Rousseau an important challenge to the Marxist view of alienation and freedom. I discuss this idea further below.

Why is knowledge of the state of nature "the most important knowledge of all"? Obviously, it is important for understanding the sources of alienation. Rousseau argues that the whole problem is rooted in the distinction between "moral equality" and "natural equality". Since this difference guarantees the production of further inequality, some legitimate but most illegitimate, it relates to alienation. Rousseau saw that equality was to become the key battle cry of democratically-based social and political movements, thus the roots of this phenomenon had to be understood.[139] From a moral standpoint, like other social contract and state of nature theorists, Rousseau was concerned to use the idea of the state of nature in his effort to establish rational grounds from which to criticize governments of the present and of future days. Logically-speaking, the *historical* existence of the state of nature is not necessarily connected to the critical worth we might attach to moral principles which grow out of it assuming its psychological reality. Morally and politically, Rousseau was concerned to establish principles of political legitimacy. By looking back into the state of nature, he hoped to discern the sources of common or shared interests or goods, and to try to understand something about the motivational side of obligation and moral behavior. Hence, we observe his discussion of the importance of "nature's voice", the role of "sentiment" and the "heart". Finally, and most importantly for this thesis, since Rousseau was concerned fundamentally to establish rational and moral grounds for law, the legitimacy of the demands for equality had to be determined in connection with the possibilities for law itself.

In the Preface of the Second Discourse, Rousseau writes, "...I believe I perceive in [the human heart] two principles anterior to reason, of which one interests us ardently in our well-being and our self-preservation, and the other inspires in us a natural repugnance to see any sensitive being perish or suffer, principally our fellow men." [my emphasis] [140] Self preservation (*amour de soi*) is a far more predominant impulse than the natural repugnance to suffering (*pitie*). Given the choice between defending oneself and inflicting pain on another, the individual would be "obliged to give himself preference". Given the preference for isolation and silence in the state of nature, and conditions of material sufficiency in that state, the *occasions* where one might find the opportunity to draw away from suffering or even show compassion for another human being are limited indeed. Recall that Rousseau says that *amour de soi* is "almost [natural man's] only care".[141]

It is very important to note that *amour de soi* interests or involves natural individuals in both "self-preservation" or self-defense *and* in "well-being" or "independence". The latter suggests notions of self-sufficiency, or balance or commensurability between one's abilities and one's needs. In social and moral contexts, this also entails the idea of freedom from subjection to other individuals' wills and from the consequences of this in terms of one's conception of oneself. In the state of nature, Rousseau supposes one's needs to be simple and easily satisfied through one's own efforts and the convenience of a plentiful nature. Put in some other ways, the state most natural to us is one where there is a coincidence between, on the one hand, needs, desires, or preferences and on the other hand, abilities, talents, or competencies. Ideally, whatever one's needs were, they could not differ from what one desired, and would be adequately satisfied through the application of one's own powers.

We cannot overemphasize the fundamental importance attached to this idea of a balance by Rousseau. For given his concern to identify the sources of alienation and, provide resolution of it, independence occupies a number of levels in Rousseau's thought. It allegedly describes an important aspect of an *historical period* long past. But, more importantly it takes up *psychological space* in that it should help to explain the anxiety and unease individuals experience in relation to their efforts to make sense of life in modern, individualistic, bourgeois, materialistic, and technologically-progressive society. Finally, as a practical ideal, it occupies *moral space*. So, it becomes important to reintroduce independence into human society.

Notably, especially against Masters' view that Rousseau provides two inconsistent teachings, we should observe that at an important level, independence or freedom remains consistent through the major works. In the Second Discourse, it is clear that the state of nature is populated by individuals who satisfy their needs through the use of their own powers. In the Emile, Rousseau writes, "Your freedom and your power extend only as far as your natural strength, and not beyond." A short while later, he elaborates saying, "The truly free man wants only what he can do and does what he pleases. That is my fundamental maxim. "[142] In the Social Contract , the "general will" is intended to facilitate "moral freedom which alone makes man truly the master of himself" and "civil freedom" which enables individuals to remain free in their private relations with each other. [143] Moral freedom entails the notion of autonomy or self-legislation with respect to decisions in moral life. Rousseau described it, in what has become, perhaps more recognizably rationalist and Kantian terms, as "obedience to the law one has prescribed for oneself. " [144] thus suggesting that at a social level, it is law or the general will which accomplishes the balance between needs and abilities or powers. Accordingly, Rousseau defines an "act of sovereignty" as "equitable, because it is common to all; useful, because it can have no other object than the general good; and solid, because it has the public force and the supreme power as guarantee." [145]

But it is important to distinguish Rousseau's sense of moral freedom from others including Kant's and recent liberal views like Rawls' attempt to undergird liberal ideas with general and universal rational and moral principles. First of all, I think Rawls' effort to integrate Kantian notions of rationality into liberal thought [146] fails essentially for the reasons put forth by R.P. Wolff in his Understanding Rawls. That is, Rawls' use of concepts such as rational self-interest [147], "bargaining" [148], "primary goods" [149], and the necessity of achieving an economic surplus [or as Wolff says, an "inequality surplus" [150]] sufficiently excludes individuals from the possibility of achieving a genuinely Kantian sense of autonomy or moral freedom. Rawls thought that by lowering the "veil of ignorance" over rationally self-interested individuals, he could set up conditions which would generate the autonomous adoption of principles of justice such as those securing liberty, legitimate differences in distribution, and opportunity. However, because of the assumptions built into rational self-interest, this generation fails. As Wolff puts it, the constraints mentioned above allow only "that their principles will be, so to speak, generally heteronomous rather than particularly heteronomous." [151] Rousseau, too, must disagree with the legitimacy and rationality of Rawls' principles of justice.

Now Kant evidently desired to achieve a set of moral principles which could stand alone or apart from any other heteronomous influences. Such principles would be the products of the internal logic and movement of pure rationality alone. These principles would guarantee, for those who followed them, moral autonomy with respect to other particular individuals, and independence from non-rational and irrational influences generally. Kant makes it very clear that the *kinds* of "goods" and "interests" which make up Rawls' list of "primary goods"and which are assumed to define "rational self-interest", are inappropriate considerations in relation to autonomously-generated moral principles.[152] Wanting or desiring material goods, or reputations based on one's level of income or wealth, are simply not aspects of rationality as Kant sees this. Kant, unlike Rawls, is not speaking of "rational desire." [153] Such desires, however practical they may be, infect the pure sense of rationality Kant requires for the generation of his "categorical imperative". Be that as it may, as we saw in the last chapter, there are crucial differences between Rousseau and Kant. For Rousseau narrows the scope of the "republic of ends" and doubts the motivational sufficiency of reason alone in relation to moral behavior. Most importantly here, Rousseau resorts to nature as an important source of moral principle and action, something Kant cannot readily do.

In addition to the qualifications immediately above, Rousseau's view of moral freedom can be distinguished from the more general positions of liberalism and Marxism. Both the latter political and moral theories assume expansive and increasingly sophisticated needs especially due to the impact of science and technology on economic production. Marxism arguably takes security and development of abilities more seriously than does liberalism. For in the Economic and Philosophical Manuscripts of 1844 and the Critique of the

Gotha Programme , Marx discusses freedom in terms of the importance of developing productive abilities, creating and satisfying needs, and maintaining integrity of and between persons and their productive capacities and efforts. In addition, in On the Jewish Question , Marx criticized the institutional grant of political rights and opportunities under liberalism as involving sham, really nothing more than *de jure* powers. On the other hand, liberalism accepts the expansion of needs as a sign of progress but tends to leave individuals much more on their own with respect to satisfying their needs in and through competitive schemes. The problem with liberalism according to both Marx and Rousseau is its tendency to encourage alienation, that is, the separation of oneself from essential capacities. But the fact that Marxism accepts, and indeed defines freedom importantly in relation to the satisfaction of higher or expanding productive needs, implies that it must also accept the responsibility of maintaining quickly *moving* balances between abilities and needs.

For various reasons Rousseau rejects the idea that service of expansive needs is conducive to freedom. In general, I think Rousseau would argue that encouraging and planning for the expansion of needs and linking this to freedom is inconsistent, uncertain, unstable, and therefore, impractical. For the distension of the need and the demand-side of production necessitates basic changes in productive effort itself. What is the purpose of the distension of need? Most would argue that it is conducive to liberty or freedom and well-being. This is plausible only if we can effectively regulate the direction of this progress.

At the same time, most people can see that the relationship between scientific, technological, economic expansion of needs and freedom and happiness is often uncertain. Progress generates benefits and burdens, and is very unstable with respect to the structure and operation of the productive process itself. Is it clear, for example, that nuclear technology, space travel, robotics, genetic engineering, long-term options in short-selling shares of stock, cosmetics, or perhaps most birth control devices have secured freedom? Is it clear that they *could* do so unproblematically? Or is it clear that re-training former cod fishermen to program IBM computers to meet the challenges of the "new economy" is either easily accomplished or obviously conducive to anyone's well-being? What about the seemingly less obtrusive idea of training presently employed and relatively secure cod fishermen to program IBMs in order to expand their productive and intellectual horizons? Is the training and re-training of individuals to perform increasingly complex technological tasks obviously promotional of individual freedom and social good? Is the generation of monotonous service-related jobs associated with the dynamics of the "new economy" significantly beneficial to those unfortunate, and clearly under-utilized individuals who fill them?

There seems to be some substantial agreement about the facts involved here. Scientific and productive progress does not translate into unadulterated social good. Given this , it is clear that Rousseau's arguments here hold some truth and plausibility. Alienation or imbalance between abilities and needs is a fundamental practical and social problem. Liberalism is problematic because it generally does not recognize any such phenomenon and presupposes the legitimacy of competitive productive or economic schemes which exacerbate the problem. Marxism is problematic in so far as

Rousseau's explanation of the roots of alienation is more accurate, and in so far as Marxism's tendency to approach the resolution of alienation at complex and massive social scales is unworkable. Rousseau finds the roots of alienation in the tendency to compare oneself with others in social contexts, and the problem of pride this generates, exacerbated most importantly by the inequitable institution of private property and complex organization. Marxists tend to ignore this radical analysis of the relationship between human nature and society itself, placing all the blame for alienation on the structure of productive relations peculiar to capitalism. Rousseau's solution involves small communities. Marxism, but not necessarily all forms of socialism, seems committed to making things work in large-scale social settings.

If the evidence supporting the existence of the natural inclination of *amour de soi* (or self preservation and independence) and its relationship to Rousseau's understanding of moral freedom is plausible, the argument behind natural pity seems somewhat more difficult. The lack of occasions to show pity in the state of nature, and some equivocation about its function and meaning there, and the lack of discussion about it in the Social Contract, cause one to wonder what place it really occupies in Rousseau's political theory. In the Second Discourse, he describes it as, an "innate repugnance to see his fellowman suffer."[154] A little while later, Rousseau says that "pity is only a sentiment which puts us in the position of him who suffers."[155] As discussed above, the occasions where pity could or would be practiced are restricted by a number of conditions in the state of nature. For in the state of nature, individuals "would perhaps meet hardly twice in their lives."[156] In addition, needs are simple and simply met through little effort.[157] Nonetheless, "under certain circumstances" pity can temper preference for the self [158], thereby establishing its relevance for moral theory. But, again, the role of natural pity seems tenuous when we consider that a natural individual lives in a world of "pure sensation" and is "given over to the sole sentiment of its present existence without any idea of the future." [159]

Given all these qualifications, what kind of real sentiment or inclination could natural pity be? Rousseau suggests that the "tenderness mothers [have] for their young" exemplifies the notion. But, this might just as well be construed as an act of self-defense or self-preservation if a natural female individual experienced her child as an extension or part of herself. In any case, Rousseau does not explicitly attribute "tenderness" to fathers or natural individuals who are males. The naturalness of pity is allegedly supported by two examples drawn from the animal kingdom. Some animals, Rousseau notes, prepare burial sites for their dead, and horses, for example, will refuse to "trample a living body underfoot." [160]

It is clear that natural pity does not mean that individuals in the state of nature develop general ideas about sensuality or suffering, or think in terms of justice or injustice. But, such individuals could attempt to avoid pain and suffering piecemeal. An individual in the state of nature would not need to, and could not in any case, develop rules out of practical experience intended to help the individual through the dangerous circumstances of life. However, one can imagine such individuals associating dangerous signs, for example, the sheen of thin ice on the steep path ahead, with the probability of pain, on an act-singular basis. Such individuals would never learn, in the sense of being able to plan for disaster, but might save themselves from disaster on the spot. Perilous moments might even trigger a rudimentary sense of comparison as a function of self-preservation, for example, the self-preservative reaction to a sow bear with cubs might be importantly different from the reaction to the sow bear without cubs. In other words, in such instances, one could size themselves up against the possible threat, "sensing" one's own strength or skill vis a vis the other's.[161] Do these characteristics establish pity? Or do they simply reaffirm self preservation?

Rousseau speaks of two "moral" attributes distinguishing humans from animals in the state of nature including "perfectibility" and "free agency". Under the latter, individuals can choose "to acquiesce or resist" the impetus or urging of sensual desires.[162] Presumably, one would not be free to acquiesce or submit or resign oneself to great pain. One would have to resist this until the end. But, in less onerous situations, for example, the first pang of hunger, one might choose or sense one's power to choose to eat now or eat later. The plausibility of such an understanding of choice increases under circumstances of material sufficiency.

Imagine now that sturdy, and physically-mature, natural individual A accidently meets up with sturdy, but physically-immature, natural individual B, in the state of nature under circumstances of A's mild hunger and B's possession of a freshly-killed spruce grouse. Does A attack B or otherwise try to steal B's supper? A, sizing up B, might go so far as to move menacingly toward B, but be discouraged from carrying out the action by B's fearful cry of helplessness, fear, or pain. This response, in combination with A's mild hunger and free agency, might disincline A from further bothering B.

It seems possible then, that pity as a *function* of a distinct confluence of material sufficiency, simple needs, fear of pain, and crude capacities of association, comparison, and free agency, and communication sometimes might "dissuade every robust savage from robbing a weak child or an infirm old man." [163] As an objective rule, which of course cannot be applied or recognized by natural individuals, natural pity does seem to countenance "Do what is good for you with the least possible harm to others." [164]

But, Rousseau claims more for the power of natural pity. He writes that it "carries us without reflection to the aid of others". Whether or not it could accomplish this may also depend upon some particular aggregation of the conditions discussed above. If some natural individual living in the clarified world of pure sentiment could conflate or muddle together his or her sentiments with another individual's or with the pain experienced by the other, one might take another's suffering as one's own. In any case, as any intimate knows, another's suffering can be a causal agent behind one's own pain. In the state of nature, if individual A is now lounging dimly under a roughly-built lean-to, and individual C, otherwise unbeknownst to A, slips out of a nearby tree breaking his arm and cries out suddenly and recognizably in anguish, A awakening suddenly, might experience a sickening pain in the core of his own stomach. Would this experience move A to C's side? Would A do so without any reflection?

It seems possible given the coincidence between fear and self-preservation, and aversion to pain, that in this scenario A might move stealthily to inspect C's, or the unknown's, situation, if A did not experience any overwhelming threat to his own existence and continued to experience uncertainty about the nature and source of his own pain. However, A seems not yet *moved* by pity or by "innate repugnance" to seeing C suffer. Given A's isolation, and his preference for or satisfaction with it, and the attendant poor communication skills, taking or showing pity might result in this example from mistaking another's pain for one's own and experiencing both an aversion to this along with fear of the unknown. But pity does not yet motivate action, for the will, in so far as it can be said to operate here, seems dominated at least until the subsidation of fear, by self-preservation. Still, if A came upon C and C's fractured arm it now seems likely that he will not like what he finally sees and understands more clearly. But, is what A sees to be understood as C suffering, or A not suffering, or A imagining what it would be like to have a broken limb? Or does it matter? For A experiences a "natural repugnance" to pain of another no matter what the subjective and perceptual circumstances. Most importantly here, nothing now seems to block A from helping C, say sitting C upright, binding his limb, and fetching a drink of water. So, while natural pity in the state of nature may not independently *move* individuals to come to the aid of others, it might be said to easily take up or administer to the *occasion* for such aid, and therefore, be said to move the will in the proper circumstances. However, A's natural disinterest in, and independence from C, will move him along his own uncertain path probably sooner than later.

As inclinations important to natural law theory, the utility of pity and independence for society depends on the ability to duplicate some of the natural circumstances surrounding its operation, and the ability to control selfishness and fear. Some of these circumstances include material sufficiency, predominance of simple needs, and ease of communication. These circumstances provide the occasion for natural pity to temper preference for the self in the state of nature. Rousseau's argument now clearly points to the desirability and reasonability of drawing out the natural virtues or inclinations and of somehow replicating in political and civil society the natural conditions necessary for their operation.

To this point we have been examining the details and implications of Rousseau's ethical naturalism. We have seen that Rousseau utilizes the natural inclinations of *amour de soi* or self-preservation and independence, and *pitie* or natural pity as sources for the principles of moral freedom and community. The first principle, as we have seen, is modeled on the framework of natural independence or well-being understood in terms of maintaining a balance between abilities and needs and can be contrasted sensibly and usefully against liberalism and Marxism. The second principle is related to natural pity in the sense that the latter suggests certain important needs, like caring and commiseration, as reasons why community is important, and provides some natural basis for holding it together other than through sexual desire and reproduction alone. At the same time, both *amour de soi* and *pitie* seem to suggest some limits on the possibilities for community. These limits were examined above in the discussion of Charvet.

Now, it would be quite a stretch, of course, to suggest that natural individuals, as Rousseau portrays them acted even remotely as non-consequentialist moral agents. The closest Rousseau comes to describing any *moral* attributes at all in the state of nature is the discussion of "perfectibility" and "free agency" mentioned briefly above. But these are potentialities and serve to distinguish between humans and other animals in the most rudimentary of ways. The former attribute, I think, refers to the unique, indeed the often unpredictable and not always beneficial, ways in which humans adapt or react to, or change in relation to their environments. The latter suggests that short of experiencing and reacting instinctually to the necessity of desire in the state of nature, natural individuals might be said sometimes to *sense* their power to choose. In the state of nature, we could only speak of sensing rather than reflecting upon free agency.

Rousseau's view of the relationship between nature and morality concerns two important ideas: 1) the relationship between, on the one hand, *amour de soi* , or self-preservation and independence, and on the other, Rousseau's idea of moral freedom; 2) the relationship between *pitie* or natural pity and the importance of community and the common good. The principles of moral freedom and community can operate in society and provide the outlines of a non-consequentialist model of moral reasoning and judgement. As such they illustrate the most important connections between Rousseau and Finnis, and therefore describe well one of the general features of natural law theory.

One of the most important features of this model, as we have seen, is the notion of a *balance* between abilities and needs. The object of agent-centered moral behavior becomes maintenance of this balance rather than the maximization of happiness or the general good however defined. This model is consistent with, though less comprehensive than, Finnis' notion of "practical reason". Another important feature is the idea of a *non-aggregated or non -additive* understanding of common good. Both Finnis and Rousseau suggest that while agent-centered activity is crucial, responsible operation of this activity can only take place in and through community.

We can dispense quickly with the objection that Rousseau's understanding of common good in effect swallows up or eliminates individuality. Sometimes, of course, Rousseau describes the relationship between the individuals and society or community in ominous terms. He writes that the social contract "can be reduced to the following terms. Each of us puts his person and all his power in common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole."[165] Perhaps even more distressing, in the Emile we have, "Civil man is only a fractional unity dependent on the denominator; his value is determined by his relation to the whole, which is the social body. Good social institutions are those that best know how to denature man, to take his absolute existence from him in order to give him a relative on. " [166]

But, Rousseau does not intend for the state to swallow up or eliminate individuality. He does argue that social individuals require a strong sense of community. Some of the sting we may experience when reading or hearing the above ideas can be removed through consideration of the following points. First, individuality is secured under conditions of *civil* freedom. The social body is to protect "the person and goods of each associate".[167] Second, when Rousseau talks of civil man as a "fractional unity" he is *comparing* individuals in social versus natural states. But, natural individuals are free, independent, or absolute only in very simple, not to mention, non-moral ways. This does not mean that we cannot locate and use a sensible model of freedom here. In any case, "fractional" unities are much more substantial beings than numerical unities. Finally, when we consider that Rousseau's theory of alienation assumes the persistence of the "human I", we can conclude that

Rousseau would think that political attempts to beat-back and smother individuality and existential experience are futile and immoral.

It is natural for social individuals to become parts of larger communities. The same could not be said for *natural* individuals. Social individuals are precisely those who, driven by pride and the pursuit of self-interests, experience anxiety over the "sentiment of their own existence", and thus, indicate a need for community. An aggregated, individuated, or purely additive notion of common good cannot supply the relevant sense of community. The latter presupposes direct democracy, cooperative enterprises, rough material equality, slow and low-tech productive processes, the desirability and satisfaction of belonging to wider communities, and the priority of public or shared goods over unlimited or expansive private goods.

We can deal quickly with the ways in which Rousseau rejects the separation and social fact theses since these ideas will be discussed again in the next section. Obviously the separation thesis must be rejected if the legitimacy, function, and content of law is tied to the service of the common goods of moral (and civil) freedom and community. The social fact thesis must be rejected if the determination of law depends at least partly on moral agents and sources. Legal positivism argues that laws are sourced in and posited by authoritative social institutions which derive their own authority to identify laws from their observance the conditions of existence and validity of law. Rousseau locates the source of laws in the general will and it is to this analysis that we now turn.

Nature, Law, and the General Will

In this section, I focus on the question: What is the general will? The general will or *volonte generale* is understood by Rousseau not surprisingly as the will of the people. So, this notion on the face of it should not be very confusing, or at least no more so than it is in democratic theory generally. Rousseau, like all theorists of democracy, argues that securing and respecting the will of the people is what counts for the legitimacy of political and legal authority. Again, consistent with democratic theory, Rousseau allows that a majority can be, under certain conditions, understood as expressive of the will of the people. What is critical to an understanding of this idea then, no less with Rousseau than any other theorist, is an understanding of the nature of the *conditions* under which the people can be said to speak coherently and purposefully. In democratic theory, no less than in natural law theory, the test of coherency presupposes that some clear sense can be given to the idea of common good.

But first, we must see that the general will is a political, moral, and legal phenomenon. It is political because it is the vehicle or transmission of expressions from the people who hold *final authority* on the matters relevant to the community. It is moral because the will of the body politic is directed at its *own* good , that is, at the common good. It is a legal phenomenon because it acts as the main *source of law*. Second, we must see that the general will, *as* a will, must be recognizable as a deliberative and decision-taking entity. Obviously, the general will, unlike the particular will of an individual, cannot be said to be located in a mind or in a mind-body nexus. But given conscientious role - playing and responsibility - taking by members of a community, there does not seem to be anything strange about saying that the group itself contains deliberative powers and operates as a decision - forming organization. In other words, the general will has voluntaristic elements. Third, Rousseau, as we know, doubts that reason alone can move individuals or groups of individuals to proper decisions, and so we see why *both* rationalistic and sensationalistic characteristics inform the voluntaristic capacities of the general will. For example, realization of common goods seems eminently rational and motivation toward such objects under the influence of cooperative spirit, or cultural integrity and pride, or love of justice or of country seems consistent with effective decision-making.

In order to say that the general will is operating properly it must secure common goods. For this to happen a variety of conditions which help to define and secure these goods must be met. In order to see all of this we must distinguish between a number of factors including 1) the purposes and terms of the social compact; 2) the formal features of the general will; 3) the elements of legislative action. For the social compact gives birth to the general will, which only then becomes available for legislative action. The social compact becomes necessary because competitive self-interest or *amour propre* has gone seriously awry producing distressing levels of unwarranted material inequality and alienation. It is characterized by the idea that individuals come to compare themselves with others competing for reputation and wealth in an effort to satisfy their own self-importance , thereby, hindering the possibilities for achieving stable balances between the abilities and needs of individuals. The general social malaise of inequality, atomistic competition for fame, power, and profit, and increasing alienation and anomie sets up the objective need to develop legitimate forms of political and moral relations.

Because things have taken this Hobbesian turn for the worse, the only fitting resolution according to Rousseau is the equally stark requirement of "total alienation of each associate, with all his [natural] rights, to the whole community." Rousseau writes that the "essence of the social compact [requires that] each of us puts his person and all his power in common under the supreme direction of the general will."[168] All of this must occur under the formal requirement of *unanimity*. The product of this original and originating decision is the creation of genuine moral relations which exist between the members of the body politic or the sovereign people. The general will becomes possible because of: 1) the kinds of moral *commitments* made. Individuals are subjects *and* citizens and commit themselves to a double engagement. An individual member commits himself *as* a citizen to the subjects and *as* a subject to the sovereign people or the body of citizens; 2) the *practical* effects associated with the strong conditions of social equality each person finds himself under; 3) the *capacity* of individuals to act rationally in accordance with the general will. Individual citizens are granted significant and inalienable responsibilities regarding legislation, and therefore, must hold and retain the appropriate rational capacities necessary for these tasks, even if Rousseau's "great legislator" has smoothed the road toward the development of the social and moral bond; 4) the common *psychological* stream and experience of alienation discussed above. These features allow us to observe with confidence the existence of a people whose members have interests and concerns for the whole. These interests guarantee the legitimacy of the laws which issue forth from the general will.

Rousseau also identifies three formal features attaching to the operational structure of the general will. Given the political, legal, and material level of *equality* between members, individuals clearly would find themselves in a situation of *mutuality* whereby what one does as a citizen affects all others and one's self. Moreover, these conditions should work toward establishing a preference for *generality* or the idea that only general objects, not particular persons, should come up for consideration in the legislative future.

In addition to all the varied terms of the social compact and the general will, Rousseau discusses a number of elements important to the *process* of legislation itself. These include regular assemblies of the people for the purposes of voting, assembly of all the people, prohibition of partial political societies, the need to formulate and present issues or questions in a specific form, the need to count all the votes, majority rule, and a specific interpretive procedure.

All of the points above including those relating to the social compact, the general will, and the legislative process must function together in order to produce genuine expressions of the general will, that is, political decisions and actions conducive to the common good. The social compact makes the general will possible. The formal features of the general will describe its central internal or structural relationships. The legislative elements channel the general will toward its objects. But perhaps, most strangely, Rousseau seems to allow under certain conditions, that the general will can be sounded out or interpreted even when many individuals vote on the basis of self-interest to exclude themselves from some obligation necessary to the common good. How can this be?

First, we must see that according to the legislative requirements set out above, issues must be presented in a certain form. We need to see this so that we can better understand the objective of Rousseau's interpretive procedure. With respect to question form, Rousseau argues that issues must be structured in a way that helps to direct attention to the general good. Indeed, all of the legislative or voting procedures seem to serve this auxiliary function. Citizens should not be asked "whether they approve or reject the proposal, but whether it does or does not conform to the general will that is theirs."[169] I think the most important idea here is the practical reminder that the general will, or the common good it is to secure, *is* the most important part of the individual's repertoire of interests. In addition, Jones points out that this "factual" formulation or presentation of a specific issue guides individuals to answer *the* specific question presented rather than some other one .[170] The suggestion here seems to be that such a formulation is less confusing than some alternatives might be and this seems plausible too.

Many readers and writers have been confused about Rousseau's interpretive procedure. Somewhat fewer have tried to dispel this confusion. I do not consider my own analysis to be redundant here, though I have benefited from Gildin's discussion.[171] I have adopted his basic model but have used it to explore and illustrate in detail a number of cases and issues which he does not. Rousseau's famous or infamous passage reads: "But take away from these [private] wills the pluses and minuses that cancel each other out, and the remaining sum of the differences is the general will."[172]. It is important to remember here that we are not so much counting up votes as interpreting the meaning of votes.

Now, Rousseau seems to assume the possibility that even if *all* individuals vote self-interestedly, that is, vote the way they do because they prefer to exempt themselves from burdens, the general will still can be determined. This seems to be a plausible interpretation of Rousseau since he imagines situations in which the general will could be sounded out even in the face of a "large number of small differences" against the object of the general will.[173] Such assumptions constitute what I will denote as the *normal case*. If the general will can be determined under these conditions, whenever someone actually votes altruistically by *including* themselves in the distribution of burdens which, of course, by and large lead to future benefits, it strengthens the general will. Obviously, probably *only* this kind of political or voting behavior, contributes to the strengthening and stability or constancy of the general will *as* a social bond, which otherwise including in the *normal case* as we will see, is in a state of flux between the extremes of altruism and partiality or selfishness and egoism. Hence, we can see the point of Rousseau's emphasis on the importance of developing community spirit or sentiment, patriotism, and a love of justice. The fragility of the social bond is illustrated below under the headings of the *normal case* , *partial partiality*, and *full-partiality* or what we can understand as Rousseau's worst case. Under all three cases, we suppose polities of varying size considering the merits of a typical question involving the relationship between the common good and the distribution of burdens and benefits: Shall taxes be increased for the purposes of repairing the water and sewage system which itself serves the common good?

In all the figures below **i** followed by a number stands for a particular individual. Votes against the question are indicated by a - sign. The former is interpreted as having been motivated by self-interest. The + signs indicate simultaneous preferences to include everyone else in the burdens of, in our case, increased taxation. Hence, the need to have vertical and horizontal columns. When - signs appear, side by side, this indicates a partial interest, that is, an agreement between two or more individuals to exclude themselves from taxation and include all others. GW stands for the general will, and **S** stands for the general will score. I have not included a separate figure to illustrate any instance of altruism. If I did, only + signs would appear in the individual columns, and in these cases they would obviously be interpreted as preferences for the common good.

Fig. 8-3:

The Normal Case (N=5)

	i1	i2	i3	i4	i5
i1	-	+	+	+	+
i2	+	-	+	+	+
i3	+	+	-	+	+
i4	+	+	+	-	+
i5	+	+	+	+	-
GW	3	3	3	3	3
S=					

Following Rousseau's formulation, that pluses and minuses must be cancelled out and the assumption that each individual's vote in the *normal case* must be interpreted as a vote for self-preference, that is exclusion of oneself from the burdens of extra taxation in our example, the sum of each vertical column equals three. Obviously, the most difficult question concerns how to interpret the general will score (S). Does S=15 or 3 or 60%? If it is the latter, is it 60% or a majority of all individuals (3/5) which in this particular case is also the bare majority figure, or 60% of unanimity so to speak (3/5 or 15/25?) which then also equals the best score possible in the *normal case* of (N=5) ? Since it is perplexing, it might seem that the *60% of unanimity-rule* is the most Rousseauan interpretation. For in the *normal case* , as N increases, the individual vertical column scores increase in a way that exceeds the bare majority figure (e.g., in the *normal case* where N=7, the vertical column score equals 5 but the bare majority figure is 4). But if we did adopt the *bare majority-rule* , the sum of each vertical column no longer seems to retain any relevance to our calculus. I will argue later that this rule holds a different but very important place. But, as N increases, the *60% of unanimity-rule* actually increases to the *$99\%^{+}$ of unanimity-rule* without ever reaching 100% or unanimity(U) since the vertical column score is always N (or U) - 2. In other words [sic], $N: [(U - 2) \times N] / N^2 = < N^2 / N^2$ or, in somewhat less technical language, if you take something away from something, you have less than the latter something.

In this result, we are considering the implications of adopting a 60% figure, rather than say, a bare majority or 50% + 1 rule, as the indicator of a minimally acceptable majority vote assuming it says something significant about the *normal case* itself. But we see that the relationship between the *normal case* in a polity of N=5 and the 60% rule is purely coincidental. For as our polity increases in size, the majoritarian figure *cum* rule attaching to the *normal case* changes. In the *normal case* , where each individual votes to exclude himself from the burdens of taxation, the majority figure resulting from our cancelling of pluses and minuses increases constantly, of course, without reaching unanimity. Because of this, it seems we must abandon the effort to locate a constant percentage or figure which serves to define the or every *normal case* and the idea of a majority attaching to it .

Instead we should adopt the *U-2-rule* as descriptive of the *normal case* . For Rousseau, this rule indicates that the general will exists at a sufficient level of soundness, or describes the "proportion of votes needed to declare this will."[174] It is the only score achievable in the *normal case*, and far from the best score achievable in the best case of *unanimity* . At this normal level, the general will is audible, without being resonant. I said above that the bare majority figure is not irrelevant. Indeed it represents the floor for cases of *partial partiality* and occupies space between the *normal case* and the worst case of *full partiality* .The cases below assume polities where N=9 and illustrate the moral and political fragility between the normal case and the worst case.

Fig. 8-4:

Partial Partiality (N=9)

	i1	i2	i3	i4	i5	i6	i7	i8	i9
i1	-	-	+	+	+	+	+	+	+
i2	-	-	+	+	+	+	+	+	+
i3	+	+	-	-	+	+	+	+	+
i4	+	+	-	-	+	+	+	+	+
i5	+	+	+	+	-	-	+	+	+
i6	+	+	+	+	-	-	+	+	+
i7	+	+	+	+	+	+	-	-	+
i8	+	+	+	+	+	+	-	-	+
i9	+	+	+	+	+	+	+	+	-
GW=	5	5	5	5	5	5	5	5	7

Fig. 8-5:

Full Partiality (N=9)

	i1	i2	i3	i4	i5	i6	i7	i8	i9
i1	-	-	-	-	+	+	+	+	+
i2	-	-	-	-	+	+	+	+	+
i3	-	-	-	-	+	+	+	+	+
i4	-	-	-	-	+	+	+	+	+
i5	+	+	+	+	-	+	+	+	+
i6	+	+	+	+	+	-	+	+	+
i7	+	+	+	+	+	+	-	+	+
i8	+	+	+	+	+	+	+	-	+
i9	+	+	+	+	+	+	+	+	-
GW=	1	1	1	1	7	7	7	7	7

The *normal case* score across all the columns for N=9 is N x (U-2) = 63. The bare majority score across all the columns for N=9 is [N - (N/2 - 1/2)] x N = 45. The score across all columns in the *partial partiality case* above is 47. The score across all columns in the *full partiality case* above is 39. Now adding up the column scores in the *bare majority case*, and using this figure as a floor, and therefore, as the measure below which the general will can no longer be heard, might seem meaningless and arbitrary. I would say that doing this does suggest some arbitrariness, but it does not thereby imply a lack of meaning. It makes sense to establish just this floor for three reasons. First, we must explore the implications of cancelling out pluses and minuses. Second, we must try to make some sense of Rousseau's view that the general will can be heard "between unanimity and a tie."[175] Third, if we do not register and sum up individual preferences in the detailed way we have done, the only way to determine the meaning of the vote, in all cases (N = 9) except *limited to full altruism or unanimity* is 9-0 against the common good.

In the case of *partial partiality* above, we observe four partial societies of two individuals each. Still, the general will score is just above the floor at 47 and, therefore, is audible. However, in the case of *full partiality*, we observe only one partial society of four individuals with the score at 39, and, therefore, a nonexistent or inaudible general will. These two examples illustrate why the requirement of no partial societies is so critically important for Rousseau. Where partial societies exist and especially where they are large and fluid, the ground between the *normal case* and the *full-partiality case* is unstable indeed. Several conditions might contribute to this problem, but the fluidity and largeness of partial associations are more likely to be problems when the conditions of social and legal equality breakdown. The problem of partial societies also suggests why Rousseau proposed, as an expedient, the rather Federalist-like idea that when partial societies did exist, and could not be mitigated through education in the common good, that "their number must be multiplied and their inequality prevented." [176] As we see, it is more expedient in terms of maintaining both social peace and order to have a great number of small, but equally-sized partial societies, than a few large and unequal ones.

Some might object that the point of voting itself is rendered superfluous because of the liberties taken under the interpretive procedure especially by what seems to be the assumption that whatever questions come to the people for approval are *already* in fact conducive to the common good. But this really is not the issue at all. Rousseau could not so lazily understand the point of voting in this way, or imagine that just because questions are framed in a certain way they must secure the common good. It would be highly impractical to render voting so empty or to actually tally up the votes by cancelling out the pluses and minuses. For the best measure of the general will and instrument of the common good is the heart-felt supporting vote of a significant majority of responsible citizens, that is, as Rousseau says, one approaching unanimity. Rousseau intends to show through his interpretive method the dangers posed to the common good by partial political societies. So long as individuals are voting *as* individual citizens, that is, according to their own independently wrought and considered opinions about the common good, rather than according to the views of partial or incomplete societies or corporate interests, all individuals can be said to hold the same common objective. Assuming that the objective of the common good is held seriously enough, and experienced often and generally in the form of real benefits, it is far from implausible to suggest, as Rousseau does, that individuals might comfortably accept an occasional defeat of their own particular opinion at the polls.

Our exploration of the operation of the general will has not been unproductive with respect to the understanding of law. Rousseau's view of the nature of law and legitimacy is no doubt radical. For according to these terms, the vast majority of political and legal systems have been and are illegitimate.[177] Because of this radical conclusion, on the one hand, it would make little practical sense for existing governments to throw in the towel and admit that their legal systems were illegitimate. On the other hand, the path to greater legitimacy seems more or less clear. In brief, it involves less social and economic complexity, more social equality, smaller political societies, more public spirit and action, and more education in and promotion of the common good.

Rousseau's conception of law involves procedural and substantive moral requirements. As we have seen, the primary procedural requirements include generality, mutuality, and equality, and the main moral requirement is that the general will must direct itself at the common good. Both kinds of requirements presuppose that individuals understand and take seriously their dual roles as citizens and subjects, and articulate the law in accordance with the interests and goods they hold in common. On the other hand, legal positivism recognizes no need to focus on individuals except in so far as they perform the roles of officials or subjects of the law. Legal positivism assumes that laws can be identified and justifiably applied to subjects without any reference at all to questions of legitimacy or moral justification or democratic foundations of law. This division between law and morality implies the serious logical, practical, and moral difficulties discussed in the earlier chapters and reviewed again in the concluding chapter.

Rousseau's critical view is informed by a conception of law which incorporates a non-consequentialist view of moral being and action and presupposes an ethical naturalist approach to the relationship between nature and morality. Law is the product of the deliberative activity of rational agents acting according to their considered understandings of the common good. There is no requirement to think and act in *instrumentalist* terms, or to *maximize* utility or happiness. Instead, individuals must be concerned with maintaining their own and other's integrity, understood as achieving a balance between needs and abilities, while legislating *as* citizens and while participating in the benefits and burdens regulated by law *as* subjects. The framework for this balance, as I have argued, is established by Rousseau's ethical naturalism, or his view that natural independence and pity can inform useful models or standards of moral behavior. Both the separation and social fact theses must be rejected accordingly for law must secure the benefits of common goods and citizens must articulate the law. This leads us into discussion of the relationship between the general will and the *integrity of law*.

Rousseau and the Integrity of Law

The *proper justification of law* depends upon the law's ability to secure a variety of goods including community, freedom, and justice, and this ability itself depends upon the extent to which individual citizen-subjects articulate the law in clear and responsible ways. Both the content of legislation and the conduct of the legislative process figure into the justification of law. This implies rejection of any justificatory schemes which assume either the separation thesis or the social fact thesis. It also makes the justification of laws dependent upon their conformity to some *external* principle of justification not the logical product of *internal*, systemic criteria of justification. Particular laws gain their authoritative status by meeting the conditions above. Even though Rousseau qualifies the role of popular sovereignty in many ways through the course of the Social Contract, it remains the case that it and only it constitutes the vehicle of justification and legitimacy. It cannot be alienated, or divided, and must be consulted on a regular basis. In the end, it remains the final and decisive arbiter of the question: What shall or shall not be considered law?

Any acceptable answers to this question depend, in good part, upon responsible action by citizens. Such individuals must not "think it is a fine thing not to obey the laws", should think of "public affairs" before "private ones", should not "prefer to serve with their pocket books rather than with their persons", and should never ask "what do I care?"[178] All of these comments imply the notion of an active and engaged citizenry, albeit one not represented by or supportive of interest groups or political parties, and one which refrains from talking partial politics when assembled for the purposes of passing judgement on questions of common good.

In addition to the constraints of mutuality and the double commitment placed upon officials and citizens generally, Rousseau describes his view of the *proper relationship between officials and citizen-subjects* in other ways. Rousseau makes three strong points regarding the relationship between officials or "magistrates" and citizen-subjects. First, officials are subordinate to citizen-subjects *as* members of the sovereign. Officials are "entrusted" with power, belong to the body politic, act as "agent" or "executive", and are not "the master of the law."[179] The reason why this relationship is necessary is because of the potential abuse of power by officials given the potential strength of their "common" or "corporate", that is, their own *partial* will. Rousseau writes that: "In perfect legislation, the private or individual will should be null; the corporate will of the government very subordinate; and consequently the general or sovereign will always dominant and the unique rule of all the others. "[180] Second, officials clearly interpret, apply, and enforce the law or the general will and so stand apart from the sovereign people in very distinct ways. They are "intermediate between" subjects and citizens.[181] These capacities are justified on the basis of their practical need in relation to good social order, and by the importance of maintaining the social and moral bond through public education.[182]

I submit that the obvious tension which exists between these first two points is addressed and mitigated by the third point, and this idea has very important implications for the concept of the *integrity of law*. So, thirdly, while performing their functions, officials should not distance themselves, their authoritative tasks, or especially *their* justificatory reasons for undertaking authoritative tasks from the only basis these can have, which is service of the common good. Since "the first of the laws is to respect the laws" officials themselves must strive to ensure that they too are "in conformity with the laws." [183] . Important here is respect for the "ancient expressions of will", or the oldest, constitutional principles of a polity, or what Rousseau understands to be the basic constituents of the common good and the social bond given the morally sound foundation laid by the social compact. [184] Therefore, the fundamental idea which emerges from this discussion is that officials should never conduct official business while setting aside their own capacities and responsibilities *as* citizen-subjects . For this violates the terms of the social compact, and therefore, the features and spirit of the general will. This is what mitigates the tension alluded to above. It is precisely this point which legal positivism ignores or perhaps even denies. For legal positivism requires that officials count *legal* reasons as *sufficient* justifications for authoritative actions. This is a prime example of how the "corporate" or *partial* interests of "magistrates" can come to be separated from the common interests of all, and of their potentially contentious relationship. Fuller, Finnis, and Rousseau all stand together on this point.

Mitigation of the possibilities for evil in the law follows quite clearly from the justificatory requirements and the constraints placed on the relationship between officials and citizen-subjects above. While there is no single formula or principle of political right which immunizes law against evil, Rousseau does provide a number of specifically moral, political, and legal answers to this problem. I will briefly review the first two kinds of answers then turn to analysis of the latter. The key moral solution involves the idea of moral freedom discussed in the sections above . Its function in relation to the mitigation of evil is straight forward. To the extent that the expansion of needs or wants occurs in society we may expect an increase in conflict of interests, and therefore, in the occasions for alienation, injustice, and evil. To the extent that alienation is experienced and the proper political and legal conditions for freedom are put in place, we may expect mitigation of evil. The primary political conditions include the idea of the self-sufficient steady state of small size and few foreign relations and the implementation of public education. To the extent that self sufficiency counters desires for international adventurism the potential for conflict and evil decreases. To the extent that tolerance of cultural and especially religious diversity which Rousseau urges becomes inculcated through public education other common reasons for conflict and war are diminished. [185]

As the entire discussion of Rousseau has indicated, there are not any strictly juridical criteria which define law independently from morality and politics. So it is hard to say exactly what we mean by a distinctly *legal* solution to the problem of evil in the thought of Rousseau. Nonetheless, I will define a legal solution as a *special* feature of responsibility that arises within the relational and operational context of the legislative process as a whole. Now there are a number of important ideas here whose capacity to mitigate evil varies.

As introduced above, the formal features of the general will include generality, equality, and mutuality. As well, we have noted that officials have special, role-related responsibilities which define their relationships with citizen-subjects. Not only is the general will general in the sense that it is the will of all directed at the common good [186], the acts of the general will are general since they cannot be directed at particular individuals. [187] As we know, this is really just a way of defining the notion of a rule. The important difference between Rousseau and other political and legal philosophers, though, is that rules are direct products of the sovereign people. This feature of law by itself does not mitigate evil in any guaranteed way since even Rousseau admits that law can enact "privileges" and create "classes of citizens" [188], in other words, it can sanction inequalities and therefore promote injustice. The practical moral implications of generality follow from the fact that effective rules must have some longevity and clarity of purpose to them, and hence, serve to limit the future actions of officials and secure expectations of those subject to them. Again, looking at generality in isolation from any of the other conditions set up by Rousseau, substantial evil may still be accomplished by those in power. Nonetheless, rules logically and practically limit such powers and do secure expectations even if only modestly.

The sense of equality important here is not so much equality before the law or equality of legal rights, but equal legislative capacity. Part of a citizen's legislative power or capacity is a function of the rough material or social level of equality which we discussed under the terms of the social compact. This sort of equality would seem to translate into a substantial equality with respect to citizens' horizons of interests and thus affects legislative capacities. When placed into the operational context of legislation the possibilities for evil seem to narrow. For laws should not have to address conflict over serious levels of material inequality.

Mutuality can be distinguished logically from equality and generality. Again, the latter refers to the abstract or general nature of the objects of particular laws. Equality refers to the idea that laws are enacted by individuals who have equal voices and share common interests and social conditions. Mutuality refers to the kinds of effects or consequences particular laws and legislative actions have on individuals. At the same time, mutuality, like equality affects legislative capacity of individuals albeit for different reasons. Here, we must return to the political and moral terms rather than the social terms of the social compact. The social compact itself, like each particular law, is the product of the double commitment or "reciprocal engagement" [189] which results from the conditions of popular sovereignty or direct democracy. Simply put, in the relational context of law what individuals do *as* citizens directly affects them *as* subjects. Assuming appropriate levels of rationality and serious-minded responsibility-taking, we can see the sense of Rousseau's idea that the will cannot harm its bearer. [190] In other words, it seems plausible to say that mutuality limits the possibilities for evil in law since those who have power to enact law are not going to violate their own common interests. It is important to reiterate that from the standpoint of natural law theory and according to Rousseau, in practice it makes no sense to separate the political, moral, and legal limits on evil. The question of the limitation of evil is as much the business of law as it is of politics and morality. This function, though, is denied by legal positivism.

Even though Rousseau, natural law theorists, and other legal theorists speak of a general obligation to obey the law, I think that it makes more sense to speak of the idea of *respect for law* . For if one respects the law, one is unlikely to violate it. This idea, as we will see in the next chapter, captures and preserves everything of significance anticipated by theories of obligation without pressing or straining the logic of the significance of benefits received, or the nature of consent, or of alleged metaphysical realities, or of the precise point of defeasibility too far. The most important motivating idea behind obligation theories must be securing stability in law and political systems generally. While the justification of sanctions or punishments for violating law follows from the non-performance of an obligation, the existence of justified sanctions seems less effective than respect in terms of promoting long-term social stability and good political order. So establishing conditions of respect for law seems logically prior to establishing the existence of an obligation to obey it especially when concerned to take a long view on the stability of law.

Respect for law really follows logically and practically from the first three conditions of the *integrity of law*. This aspect of the integrity of law combines arguments about the importance of benefits received, consent given, and the significance of expectations. The justification of law rides in large part upon the provision of common goods. This point is absolutely basic to natural law theory as a whole. Popular sovereignty and the soundness of the relationship between officials and citizen-subjects entail obvious consensual aspects. Again, natural law theory generally assumes the importance of developing far reaching and mutual responsibilities between these parties. The argument for *respect for law* simply assumes the probability that the likelihood of violations of the law decreases as benefits are received, as citizens participate more directly in legislation, and as individuals come to understand the importance of honoring the role-related and other expectations arising out of the two former conditions. As we have seen, according to legal positivism, it is not clearly the case that even officials must have respect for law. Even when they must, the degree of respect for law officials must have is insipid and well-diluted.

This rather lengthy chapter has illustrated how the specific theories and approaches taken by Detmold, Fuller, Finnis, and Rousseau all exemplify efforts to apply the central epistemological and moral commitments of natural law theory set out in the previous chapter. I have tried to show how each theorist also incorporates commitments to the main features of the *integrity of law* . In the next chapter we bring our examination of this idea into full focus discussing it as the most important critical instrument of natural law theory generally and especially in relation to legal positivism. Here I develop the concept further by considering its features in the context of a more general philosophical discussion of ideas about justification, responsibility, and obligation.

Chapter Nine

Where does the concept of the *integrity of law* come from? What is its function? The *integrity of law* serves a critical function as employed here in relation to legal positivism and may be understood as the main moral and critical apparatus of natural law theory. The sources of this complex and critical concept are varied and include: 1) The simple need for a critical theory of legal positivism, or of any theory which, as Finnis argues, leaves the adoption of its practical viewpoint undefended. 2) The ethical naturalist and non-consequentialist components of natural law theory. For the goods identified through ethical naturalism, along with the non-consequentialist aspects of moral and rational being and action directly contribute to justification in law ; 3) The complexities of communication and interaction involved in interpreting, applying, and following the law described by Fuller; 4) The internal attitudes of officials and citizens which accompany social orders based on law rather than force as discussed by Fuller, Finnis, and Rousseau . In this chapter, I elaborate upon each of the four main features or desiderata of the *integrity of law* while reviewing the relevant weaknesses of legal positivism. As a preliminary to developing these points, it is necessary in order to avoid confusion or conflation, to distinguish between my concept of the *integrity of law* and Dworkin's notion of "law as integrity". [1]

Critique of Law as Integrity

First I must provide a brief sketch of Dworkin's argument. Dworkin's general concern, like my own, is to rectify the theoretical oversimplifications and practical inadequacies of legal positivism as a theory of law. As I have argued, the identification of law through the criteria of validity and the conditions of existence which establish the "union of primary and secondary rules" are insufficient with respect to proper justification of the law. Further, the idea of judicial application of general rules to particular cases is incomplete as an explanation of adjudication since it seems to suggest that the resolution of hard cases does not and need not be understood as occurring as part of normal, that is, rule-based judicial behavior. Legal positivism tends to leave such cases out in the emptiness and remoteness of the moral hinterlands where their resolution becomes a matter of judicial creativity and a blurring of the functions of legislation and adjudication.

But hard cases must be resolved, and like all cases in law, must be soundly justified. Given the pregnant and momentous nature of hard cases, it seems strange for a legal theory purporting to give a complete description of the legal practices contributing to the formulation of law and the justificatory practices resulting from these ideas, to ignore the relationship between hard cases and justification. Dworkin agrees and views adjudication as interpretation and law itself as an "interpretive concept" involving "legal principles" notably which provide for the moral justification of law. [2] Justification, according to Dworkin, requires that judges retain a basic level of agreement about the rudimentary legal institutional functions and standards while placing the resolution of hard cases in their "best light". [3] In other words, the resolution of hard cases must make the general practice of law the best that it can be *within* the constraints of the basic level of agreement mentioned above , and judicial recognition of *their* moral responsibilities to justify all legal decisions. Dworkin, I think sensibly enough, understands the crux of the problem of justification as finding a balance between on the one hand, the idea of "fit" [4] or the empirical level of agreement existing within judicial practice especially including any general agreement about the form and content of legal precedents, and the need to provide moral justification of legal decisions on the other. Importantly, this suggests that legal positivistic concerns about the authoritative status of the criteria of validity and the associated notion of legal justification, might need to be subordinated to the level of agreement surrounding, for example, the use of precedents and the recognition of judicial virtues and responsibilities.

While there are some important similarities between our ideas of integrity, the differences between these two critical concepts are very great. I will first discuss the similarities between them. As we have seen, I agree with Dworkin that legal positivists exaggerate the importance of mechanical or rule-based application of the law. At the same time, they fail to allow that judges have responsibilities, as opposed to options, to identify moral principles important for the resolution of cases which do not fall readily or clearly under established or accepted secondary rules. The early chapters of this dissertation focused on the ways in which legal positivists have dealt with a variety of moral problems. Second, the social fact thesis so central to the identification and legal justification of law according to legal positivists is not capable of identifying or accounting straightforwardly for the moral principles necessary for the resolution of hard cases. In Chapter Six, I devoted much discussion to the difficult relationship between rules and principles given the logical, practical, and moral implications of the "strong" social fact thesis. This discussion questioned legal positivism's logical and ontological assumptions about the relationship between the criteria of validity and moral principles. Most importantly here, and despite Hart's apparent view that moral principles can arise "in the course of the operation of a working body of *rules* " [my emphasis] [5] , legal positivism does not connect the practical need to resort to moral principles with a well-defined notion of judicial responsibility. Finally, and related to this, both Dworkin and I criticize the content of the internal attitude provided by legal positivism as effectively empty. This part of Dworkin's notion of integrity underlines again the significance of Fuller's idea of "congruence between official action and declared rule" discussed under the headings of procedural natural law, and under the feature of the *integrity of law* I have denoted as *appropriate relationships between officials and subjects* . [6] All of this means that in a general way I agree with Dworkin that the main concern of legal theory must be with justification.

But our differences are vast. First, Dworkin arrives at his critical concept without obvious reference to the justificatory elements of natural law theory, and second, he employs his concept in a different way than I do. These points are related but I will discuss the second point first. Dworkin makes some very wide claims with regard to the application and practicality of "law as integrity". I, on the other hand, intend the *integrity of law* only as a device useful for understanding some of the more important moral requirements of the justification of law. I do not utilize it, as Dworkin does, as a unifying ideal for particular pluralistic, liberal-democratic societies, or as a symbol definitive of the formation of genuine political community out of otherwise diverse moral beliefs and conflicting group and especially individual interests. Indeed, some of the discussion of public or common goods in the sections on Finnis and Rousseau above ought to suggest that unifying pluralistic society into a genuine political community is at its least a tall order. In fact, it is one which demands important attitudinal and educational adjustments of present bourgeois pluralism. Unity or community cannot be the stipulated result of otherwise diverse and opposing interests rallying around some schedule of individual rights.[7] The *integrity of law* claims no such comprehensive function. However, in so far as it increases the general recognition of the justification and purposes of law it can promote the health of any political society based on its impact on the ways that officials and citizens would come to view the law. But I do not claim that it could stand in independently as a unifying ideal, myth, or symbol in pluralistic societies .

This brings us back to the first point. I do not think that Dworkin utilizes the natural law framework in his effort to describe the principles he thinks most basic to judicial practice. Even though Dworkin seems to suggest that principles respecting *individual* liberties and rights have the status of universals, the excessive focus on individualism to the exclusion of social relations and communitarian values disqualifies him from the natural law fold as I have set out its terms. Dworkin's excessive focus on individualism is exemplified further by his view that legal principles must invariably identify the rights of individuals or groups.[8]

Further, the promotion of the health of any political society requires attention to common or public goods. The *integrity of law* recognizes this and argues that law itself must function to secure such goods. On the other hand, Dworkin essentially argues that law only has the *negative* function of protecting existing individual rights, and that it cannot itself promote "collective" goods without violating individual rights.[9] The promotion of collective goods is understood correctly by Dworkin as a matter of public policy, and therefore, of government. But he effectively throws up an inappropriately strong barrier between government and law. For he argues that law, as an institution established to restrain power generally, must not directly promote the public policies of an institution, that is, of government, which in this view naturally tends toward self-aggrandizement, and perhaps to abuse. Dworkin's theory of law assumes a *political* liberalism pure and simple. It assumes that there is a natural and constant gulf between private individuals and their government. But I think that the boundary between the public and the private implied by this assumption is overdrawn especially where common interests, goods, and projects are concerned. According to natural law theory, there are substantial common goods and every reason for governmental support of them.

How does the discussion just above about the relationship between the public and the private bear on the conflict between legal positivism and natural law theory? This is a difficult question to answer since legal positivism claims to be a purely legal theory, one distinct from substantive political and moral theories. On the one hand, legal positivism does not take a stand on the question of the exact boundary between public versus private areas of activity in the sense that it prefers particular arrays of, or wider or narrower fields for individual rights or governmental activity . On the other hand, it does seem to take up a clear position on the nature of the *public* .

One could argue that legal positivism discounts law itself as pubic thing, or *res publicum* . This is not to say that legal positivists do not think that law must be public or made public. For it must be so as part of the notion of an effective rule. Nor is this to say that legal positivists do not think that law is part of a society. Focusing within the framework of the concept of validity, we can say, first, that law belongs to a *structure* of accepted rules. Secondly, and in more practical terms, no legal positivist would deny that this implies real connections between social or legal rules and all matter of activities of importance to society. But there is no question that legal positivism disconnects law from the more traditional notion, one crucial to natural law theory, that law somehow emanates from and belongs to the public.

Just this view is denied by the social fact thesis in particular for the following reasons: 1) Law is not a public thing since neither officials nor subjects need be public-spirited or recognize themselves as having any responsibilities to uphold the soundness of public purposes including, evidently, the practice of law itself; 2) Law is not a public thing in the sense that decisions to apply the law need not be justified by or connected directly to any specifiable public purposes. Legal positivists cannot rebut here by saying that the structure of rules created by the criteria of validity constitutes a public purpose because no one seems to be charged with any responsibility toward maintaining it. Further, the structure referred to just above constitutes more of a logical shell of law rather than of law itself, that is, of rules which serve public ends including individual and common goods. In so far as such goods are moral in the sense that they emerge from the naturalistic and non-consequentialist concerns important to natural law theory, the separation thesis, too, implies that law is not a public thing.

The *integrity of law* claims that it is sensible or practical to try and achieve a balance between individual interests and rights and common goods. As we have seen, it tries to accomplish this through the inclusion and education of all individuals as equal and effective participants in common goods. Natural law theory argues that common goods are more common and manifold and much less ethereal than is often imagined including goods of, for example, fraternity in community or in communities, cooperative enterprise itself, public goods or those goods beneficial to all and which can be participated in by all members, infrastructural and auxiliary goods or those which facilitate coordination and cooperation, and a full-dimensioned scheme of justice. General recognition of and support for such goods is largely a matter of education, the sort of education which encourages responsibility and civic virtues without smothering individuality. Promotion of common good logically need not imply, and from the critical standpoint of natural law theory, ought not include strict equality between, or crush the individuality of, the members of political society. But if we are going to speak of real communities they must entail significant participation of members in common goods, and the justification of law depends more than anything else on the promotion of such goods.

Justification of the Law

At its most general level, justification seems to be of two sorts: *internal* and *external* . The former involves appeal to the principles regulating or guiding the operation of a *closed* system, institution, or practice. These principles are the most logically basic or rudimentary principles available which constitute the logical structure of a system and authorize or account for the movement from and between more general to particular rules within the system. Rules in this sense are defined in terms of their systemic relations with each other. Much of the objective appeal of this type of justification must be its promotion of organization or order through a self-regulating logic , or in reference to its implications for organizing and guiding practical affairs. One might also find some objective appeal in the elegance of such a system.

But as a strict matter of logic, appeal to the importance of systemic maintenance, or to the desirability of some wider practical implications for social order or coordination, or perhaps a strange appeal to aesthetic value, cannot inform the internal justification of a closed system. In other words, discussion of the value of a rule or set of rules in terms of what the rule(s) accomplish for the system *as a whole* or for social order more generally is largely irrelevant with respect to the primary purpose of the rule(s) itself which is to validate other rules *in the system* . The validation or justification of particular laws and decisions results from accordance with the rules internal to the system, and ultimately from the fact of *conventional acceptance* of the most basic rule(s). As soon as one appeals to the functions of a logically-closed and internally-justified or validated system as they relate to the maintenance of the system as a whole, or to the practical implications of these functions, *as reasons for* accepting the system, it seems to me that one instantly must weather the critical storm of comparable functions and systems and their practical points, and so must stumble into the land of external justification. From the standpoint of the sufficiency of internal justification, discussion of anything but logical functions of and relations between *particular* rules then seems superfluous if the divide between internal and external justification is to be preserved.

Thus it seems that a *system's* purpose occupies a very precarious position with respect to the concept or concepts of justification. It cannot be appealed to as a reason for applying or accepting the authority or validity of any particular rule in the system because, if it is, the appeal opens itself up to two kinds of challenges. One might challenge the efficiency of the means toward the singular purpose in question, or challenge the value of the purpose itself in relation to other purposes. External justification, on the other hand, involves appeal to an independent standard outside of the internal or systemic logic of a system or institution . Allegedly, this sort of justification gains its objective strength by either grounding or challenging institutions and their purposes in non-circular and non-conventionalist ways, thus meeting criteria of rational and perhaps intuitive soundness.

In his important article "Two Concepts of Rules", Rawls sets out to defend the soundness of the logical distinctions made above, he also suggests some practical reasons for doing so. [10] It is my view that both the logical and practical reasons are suspect. I think that Rawls and others confuse the concept of justification with the notion of a *description* , and that the practical reasons behind resorting to the internal practice discussed above and throughout this dissertation as use of the criteria of validity are of less weight than they are thought to be by legal positivists, and evidently, by Rawls too.

Rawls argues that we must distinguish between "justifying a practice" and "justifying a particular action falling under it." [11] This distinction tracks the notions of external and internal justification above. I do not quarrel with the idea that perhaps the most important practical reasons for thinking that one ought to make such a distinction include the importance of getting a practice off the ground in the first place, and keeping it running in the second place. [12] No doubt *something* must be done to exclude wholesale and continuous questioning and challenging of the system. My rebuttal to this objection can be stated simply. This *reductio ad absurdum* scenario will not develop if a practice is either well grounded in the external sense of justification or generally inclusive or both.

Besides the weakness of the practical argument, I think there are important logical and conceptual difficulties to note. Perhaps one can distinguish logically two concepts of rules, but I do not think that it necessarily follows, as Rawls seems to assume, that this implies differences between forms of justification. It does follow that rules can be distinguished in terms of functions. Rules can have systemic functions or justificatory functions. We cannot pretend that logical distinctions between rules necessarily imply logical distinctions between forms of justification because "practices" themselves are not commensurable. There are in fact general practices which require justifications and those that do not. Speech is an important general practice that does not require justification. On the other hand, almost everyone thinks that we must justify regulating and limiting some particular uses of speech like perhaps vocalizing the pretense of a tubercular fit while riding a crowded public transit. As well, abolition of all particular speech-acts, while sounding a little strange and maybe self-defeating, might be justified religiously for example. But speech itself seems so laden with purposefulness and necessity that it escapes the need for justification. Law is an important general practice too, but requires justification through service of common goods. On the other hand, particular laws may not always directly serve the common goods served by the system as a whole. There is a balance to be achieved here which I discuss further below.

Rawls and others who defend the distinction between justifying a practice and justifying particular actions within the practice rely excessively on the analogy between practices and "games". [13] I have argued and will review here why there is no "law-game". First, it is wrong to suggest that all practices have the characteristics of games. Games, I would argue are optional, whereas, probably the most important practices, including law, are non-optional. We do not move freely in and out of law. We are always in it to some degree or other. Further, since engaging the law involves the risk of losing and is non-voluntary, there is little sense in describing law as something most everyone unqualifiedly wants to do. At the same time, there is an objective need for law. On the other hand, most people engage themselves in games because they want to, this may be a function of wanting to win, or simply wanting to play the game for fun. Second, there are many ways in which the characterization of practices as games makes trivial what actually occurs in many practices. Staying with law, while citizens [sic] players may be engaged in activities resembling "winning" and "losing" and the making of "moves", this part of the practice of law is at an important level usually continuous rather than discrete since former cases continue to be used as precedents and interpretive devices. Importantly, this characteristic of law attests to its uniquely social and public purposes. Most games do not usually take account of principles of fairness as this relates to the application of rules. Most importantly here, this view makes trivial what judges do in law. It is ridiculous to think of judges' decisions in the final analysis as analogous to a pointing gesture to a rule-book. Most judges, thankfully, are not mere bureaucratic functionaries, logicians, or inquisitors.

This brings us to the crux of the matter. Is it plausible to understand an umpire's reference to chapter and verse of the appropriate book of rules as a *justification* as Hart imagines? This question is difficult since the idea that rules warrant or authorize the use of other rules does make sense and there seems to be a close connection between authorization and justification. But, in the end, players in games do not seriously challenge the rules themselves or the umpire's right to apply the rules. For this reason no one can sensibly expect a defense of a decision in the form of a justification, that is, in terms of the rightness or wrongness of the decision. More precisely, what is sought and *given* is a clarification of the relationship between rules or of a particular interpretation of the rules. In both cases we are looking at explanations or descriptions of decisions or actions not justifications of them. In these cases, the umpire provides a picture of the systemic relations between rules, or a description of the ways in which an action falls under a particular rule is given.

Still legal positivism accounts for the legal justification of law and judicial decisions according to the requirements of internal justification. The criteria of validity validate or justify a particular law or decision as belonging to the broad system or practice of law. But justification here really amounts to the identification of institutional progeny. The progeny gains the strength or recognition of the authority of the great organization surrounding it. Natural law theory accounts for the justification of law in moral terms while recognizing the importance of distinguishing between legal practices and others. It employs external justificatory criteria. Particular laws and decisions in law presumably gain the strength of immediate acceptability assuming the pre-existing approval or recognition of the external principles appealed to. These distinctions suggest something of great practical importance about our two theories of law. Legal positivism accepts the possibility that the *effectiveness* of law may in fact result from the mere force of great organization including its associated sanctions. And it certainly sees no necessary reason to try and foreclose this possibility. On the other hand, natural law theory prefers to establish linkages between *effectiveness* and moral justification.

What other alternatives are there to internal and external justification? Two possibilities seem open. We could try to balance between their legitimate claims. This is the approach I favor and will argue below. Or we could forget the whole thing. That is, we could pretend that justification does not matter. But this amounts to nothing more than a too luxurious theoretical position to take up. Obviously, this last comment assumes the practical importance of dealing with the problem of justification. Suppose though that the suggestion to abandon ship assumes the theoretical weight of emotivism, relativism, conventionalism, or prescriptivism behind it. Well, I think that all the latter theories can be defeated on practical and logical grounds. Neither position, I would argue, understands the rootedness of justificatory effort as a very practical and intimate part of human behavior and history. From a logical standpoint, emotivism may be defeated in the same way as relativism and conventionalism since it is not plausible to unexceptionally *equate* feeling or belief or mere acceptance with right and wrong. For too many logical and practical absurdities result.

On the other hand, prescriptivism reduces the concept of justification to the idea of a language-function. Now we need not say that all language-functions are equal with respect to the smooth running of a language, that is, its capacity to facilitate meaning and communication. For example, forcing a choice, our own language as a whole would function better without the use of articles than without the use of say prepositions. But the *basis* or point of justification and commendation *qua* language-functions is as obscure as the basis of any other language-function, and much more distressing with respect to the former functions because of the relative differences in practical importance between forms of commendation. Note the differences in the *use* of the adjective good in good language-function, good mountain, good pizza, good hammer, good run, good try, good sense, good decision, good guile, good manners, good person, good death, good enough, and good grief. A practical interest *in* justification serves as the basis for the genuine moral commendations amongst these examples. For exclamations and statements describing the performance of an *internal* systemic function as, for example, good language-function, are not commendations, whereas statements of the value of a system or a system's overall function can be. Further, all commendations are not moral. Some involve etiquette or aesthetics or non-moral practical interests. Moreover, the forms of justification themselves vary with them. A geologist will likely employ a different standard of *good* mountain than a wilderness photographer. There may be some coincidental agreement about the objects of their evaluations or even agreement about some aspects of the relevant evaluative criteria. But the *practical* sense behind the evaluations is controlled by their distinct *interests* in mountains.

Justifications have the practical effect of guiding decisions and actions in relation to interests. Further, they involve appeals to reasons. Of course, prescriptivism acknowledges all of this. But it seems to complete the analysis of justification with the observation that justification is essentially a language function.

If we want to reduce the meaning of justification, evaluation, commendation, and other acts of speech to language-functions we do so at the risk of ignoring the significance of practicality and interests. Most importantly, with respect to the critique of prescriptivism here is the idea that the *basis for* the practical interests referred to above, especially those associated with justificatory practices must be examined. Prescriptivism, unfortunately, suggests that further examination yields the proposition that decisions about moral principles and actions depend upon personal choice. As we saw above, Philippa Foot, and natural law theorists, criticize this view as ignoring the reality of moral constraints not subject to such open-ended choice.

Now there are several ways of trying to balance the claims of both internal and external justification. We could adopt a pragmatic approach, or a coherence theory, or we could adjust the *legitimate* claims of each to each other. The latter approach need not assume equality between the claims. Indeed, my own position does not. Pragmatic justification requires that we identify the purposes of institutions or practices and adopt the set of rules internal to them on the basis of their efficiency toward these identified ends. It is a balancing strategy only in the sense that rules are assumed to be equal candidates as means to the adoption of desired ends.

I said above that *if* legal positivism was forced to define and defend the functional purpose(s) of a system of law it would risk upsetting its claim about the sufficiency of internal justification brought through the criteria of validity. For in forcing debate about ends, we call into question the assumption it makes about the legitimate rivalry between internal and external forms of justification. The assumption is critical for the working of a legal system as legal positivism envisions it. So why bother, as most legal positivists have, with any discussion of the practical or moral value of an order generated from the observance of the criteria of validity or its practical implications for any other ends? Well, as I have suggested, it is eminently reasonable to do so. Besides, when we think seriously about law and justification, it is also rationally necessary to do so. For the internal consistency of a legal system, the features of its internal justification, and the conventional acceptance of the whole structure have absolutely no important value in themselves. Their value is to be understood *in connection with* justification.

Recall the ridiculousness of the landlady's response to K. concerning Herr Momus' view that the observance of a protocol was important as a matter "merely of keeping a record...for the sake of order." Herr Momus might be thinking about, and the landlady might be covering up, many other things. But the achievement of order for its own sake cannot be construed as an important or special legal value. On the other hand, a deep-spaced stranger observing The Castle, might strangely appreciate its refinement as an organization, but this too is irrelevant to understanding the concept of law.

In the early chapters we saw that legal positivism may very well accept the possibility that a judge might go ahead and think like Herr Momus or our alien from space. At the same time, it does discuss the importance of achieving values outside of those strictly related to validity. For example, it emphasizes order-achievement *through* law, and precision of thoughtful analysis of legal and moral phenomena *through* adoption of legal positivist categories. Indeed, the concept of law it argues for allegedly facilitates passage from pre-legal, tradition-based, technically, economically, and politically-unsophisticated forms of society to legal, and socially-complex forms. At the same time, the theory allegedly straightens out our thinking on the relationship between law and morality. Much of this dissertation has tried to show why the latter objective fails.

On the other hand, from the standpoint of pragmatic justification, it is not obvious that legal positivism, *through* the "union of primary and secondary rules", offers the *best means to* the level of social order it explicitly tries to facilitate. If the smoothest possible running of complex social, technical, and economic machinery is our end, it is at least arguable that *some* form of authoritarian society is required rather than a formal, positivist rule-structure. Perhaps, the social managers and technical elite could be offered individual incentives to work together managing society and goading research and development, and all others might be chained to their computer terminals or even have microchips implanted in their brains causing them to think that life as a cog in a wheel is satisfying. If, on the other hand, the objective is to facilitate passage to modern, complex society *through* the development of legal institutions offering "adaptability to change, certainty, and efficiency" [14] , then indeed there is *no* logical or practical reason for lending rules internal to the system of law any *independent* value at all. For we risk hobbling movement toward our end. But since no legal positivist or serious-minded natural law theorist wants to discard the value of distinctly *legal* practice, pragmatic justification must be unacceptable to both.

This brings us to the other possibilities of balancing between the claims of internal and external justification. Coherence theory attempts this balance. Both external and internal justification share the general feature of *derivability* . In other words, both forms draw subordinate decisions, rules, and principles from supraordinate ones. The only difference between these two forms concerns the location of these supraordinate points outside or inside of the system in question. Coherence theory is most common in the philosophy of science. According to Goodman: "The process of justification is the delicate one of making mutual adjustments between rules and accepted inferences; and in the agreement achieved lies the only justification for either." [15]

Applied to legal practice, a coherence theory would make adjustments between on the one hand, *accepted* facts like clear precedents and settled rules and their validating capacities *with respect to* particular decisions, and on the other, the demands for principles and instances of moral justification. Ideally, a coherence theory would satisfy *all* the demands of stability or consistency *and* moral justification. The problem with this theory is that it lends us no useful guidelines for *how* to achieve coherence. Evidently, from the standpoint of coherence theory, it makes *no* difference in principle whether we draw facts about what is accepted as a rule into line with *appropriate* moral principles, or if we draw moral justification into line with *accepted* facts. Roger Shiner identifies this problem when he questions whether "being 'principled' simply mean[s] achieving a formal consistency between principle and particular judgement *with either one* vulnerable to rejection in the cause of achieving consistency, in the manner of Goodmanian science." [my emphasis] 16 Supposing that *principle-maintenance* and *systemic-maintenance* exist on the same logical and ontological plains, evidently it cannot matter, according to coherence theory, *where* we start the game or how we conduct it. Perhaps, we can ignore trying to establish truly appropriate moral principles altogether? But then the whole idea of *coherence* loses meaning. Coherence cannot mean mere consistency. In any case, in legal practice this nonchalance toward *appropriate* principles cannot be acceptable given all of the practical and moral interests which come in for decision in law. Thus, coherence theory applied to law is unworkable.

But let us give it another try. Let us suppose that the *principle* of coherence, as opposed to consistency, dictates that: Since all appropriate moral principles are *equal to* facts about institutional consistency or the fit between accepted rules and particular decisions, *with respect to* their appropriateness to the logical structure transformed or created by coherence as opposed to mere consistency, the adjustments between them, or effectively the cancelling out of principle by accepted fact or accepted fact by principle, must be *equalized* over time. Other than the new layers of impracticalities involved here, the critical problem with this formulation, with its underlying intent to operationalize an otherwise inert coherence model, is that it shows coherence theory collapsing into a theory which also works on the basis of *derivability* . For the principle of coherence stated above becomes the supraordinate point in reference to which future decisions about adjustments are to be made. While subordinate principles might be infinite due to mathematical combinations, they are probably reducible to the imperative 'take your turn', and suggest that coherence theory *as* a coherence theory is incoherent.

Indeed, now in relation to legal positivism, coherence theory becomes a theory of external justification. And when we resume consideration of the importance of functional ends or objectives, coherence theory, like legal positivism, assumes the overriding importance of achieving consistency and order albeit coherently. But in coherence theory we are far and away from even the sparse practical sense of order-achievment associated with legal positivism given its talk about facilitating modern society. In fact we seem much closer to the sort of values which might be important to our space stranger. Of course, this reformulation of coherence theory is unsound for another reason. For what good reasons are there in the first place for taking turns between presumably good, that is, *acceptable* moral principles, and good, that is, observably *consistent and accepted* institutional facts? Is coherence theory applied to law a theory attempting to establish a *just* logic between allegedly morally-neutral facts and moral principles external to these facts? Perhaps space strangers might find solace in melding aesthetics, logic and morality in this way but we should not. Or does the discussion above instead imply the objective *need* for a theory of justice which will mediate between the legitimate interests behind legal and moral reasoning? In a very strong sense, the focus on justification in this dissertation argues exactly for this need and attempts to resolve its difficulty.

The question finally becomes one of deciding what sort or degree of value to assign the rules and practices internal to the system of law. Legal positivism, as we have seen, assigns some of them independent value such that legal justification can come to rival moral justification as reasons available to judges for applying a law, given the fact that legal validity only permits but does not require moral commitment and evaluation to enter into the justification of law. In other words, legal positivism allows judges to focus *exclusively* on the criteria and reasons of validity in reference to the tasks of identifying and applying the law. On this basis, I have alleged that legal positivism retains positivistic pretensions. Further, I have suggested that this misrepresents what judges do since most recognize, or probably easily could recognize, that *some* moral principle(s) inform or influence laws. The legal positivist separation of legal and moral thinking also undermines the moral agency of individuals by treating them as subjects rather than as citizens who have responsible roles to fulfill in law. Finally, I have argued that the logic of validity leaves itself open to the possibility of great moral evil in law. Evidently, a judge might sentence an individual to death or an ethnic minority to forced sterilization on the basis of reasons of validity *alone* . The upshot of all of this is that the legal positivist vision of acceptable legal practice is, to say the least, not well connected to the common good. I review some of these points just below.

I think that the adjustment or balance between moral justification and the independence of legal practice cannot assume *strict equality* between these points of reference. If we do, we risk falling into the difficulties attached to coherence theory on the one hand, or those attached to legal positivism on the other. Quite clearly, it would be irresponsible and perhaps dangerous to jettison *all* of law's criteria of internal organization and justification in favor of bringing about the values associated with *any* external moral principle. My own view is that a significant measure of judicial independence, the use of secondary rules to help identify primary rules, and many aspects of due process including the rule of precedent, the principle of treating like cases alike, the application of general rules to particular cases, and use of the *facts* of conventional acceptance and systemic relationships between rules as reasons (but not as sufficient ones) for the taking of a decision in law should not be abandoned.

While we can and ought to afford to preserve the legal principles and practices noted just above, we cannot afford to preserve the notion of the *sufficiency* of justification attaching to the criteria of legal validity. There is simply too much social, moral, and practical background relevant to the question of justification to ignore it. At the same time, some of the points made in Chapters Four and Six show that in practice, legal positivism evidently comfortably involves itself in logical and practical absurdities like: 'the injection of Z with lethal drugs was legally but not morally justified' or 'the sterilization of all the blue eyes by the brown eyes was required by law but not morality'. These statements are logically and conceptually absurd assuming that a sound understanding of justification must recognize the implications of the brute finality of such decisions. Some of the practical and moral implications of legal positivism's separation of forms of justification are uncontroversially horrifying.

The main problem with legal positivism's understanding of justification is that it does not take *anyone's* practical reasoning seriously. The level of justification which results from the criteria of validity provides justification of a judge's decision in law and the practical consequences of this decision. On the one hand, allowing judges to make their decisions exclusively according to reasons of validity debases the concept of *judgement* itself, turning it into mere deduction or something close to this. On the other hand, the judge is also justified in putting the decision to some use. For as we know, the criteria of validity also justify the application and enforcement of legal decisions in relation to those particular persons who are subject to law. But legal positivism generally recognizes no reasons for offering the subjects of law any good reasons for why they ought to conform to the decisions wrought through the criteria of validity. Further, it recognizes no official responsibility to do so that one might refer to as constitutive of legal practice. Because of this, legal positivism cannot be said to take the practical reasoning of the subjects of law seriously.

The only available justificatory reason which a prospective subject might but need pick up and utilize as an explanation for why she ought to conform to a particular law is the one generated by the criteria of validity. That is, a subject could take the fact of a particular law's legal pedigree as a reason for obeying the law. More accurately though, according to the terms of legal positivism, this fact only provides the subject with a reason why *officials* are holding her under a legal obligation. Unfortunately, so far as I can tell, even the provision of *this* shabby sort of reason to a subject is not a recognized judicial responsibility under legal positivism. But if a subject is compelled by her capacity of practical reason to find justificatory reasons for obedience , it seems that all legal positivism has to offer her is that well-worn repetition "the law is the law". For this is the only legal positivist answer available to questions like: Why should I follow this authoritative text? Or why should I do what the Queen says? Placed in the wrong hands, that is in the hands of a tyrant *cum* logician, we risk, as Rubashov in Darkness at Noon described, replacing moral and political "vision by logical deduction" and invite the prospect of legal genocide. Why accept a legal theory like legal positivism which seems to leave itself logically open to this too familiar possibility? How can a legal theory be so complacent in the face of obvious evil?

Alternatively, as we have seen, the sense of moral justification contemplated by natural law theory intends to cover both of the justificatory needs described above. Importantly, the main instrument here is appeal to the common good. For considerations of the common good inform judicial decisions *and* the practical reasoning of the citizen-subject deciding whether or not and why to obey the law. At the same time, given the fact that there are legal values which retain independent though not absolute force, and assuming that in practice such values will be more relevant for judges and lawyers than for others, it is possible that in some cases the citizen-subject will find no acceptable reasons to obey the law in question. This consequence is justified since legal institutions must keep a level of independence and because of the occasional problem of moral uncertainty itself. The important point is that this consequence will likely be infrequent given the closer relationship between citizens and officials and the law itself.

At this point, it is important to respond to some obvious objections. I am arguing that we can and should dispense with any idea that allows judges to rely *exclusively* on the criteria of validity as reasons for applying the law. The acceptance and use of secondary rules, and the systemic relationship between them and primary rules can be used by judges as reasons for making their decisions, but such reasons cannot be construed as sufficient in relation to the justification of such decisions. Given the closeness of morality and law, justification entails much stronger and more widely distributed internal attitudes than legal positivism allows, and it requires more fully developed role-responsibilities for officials and citizen-subjects, as well as reference to the goods, especially the common goods, important to the society.

Now as we have seen, validity has been defended in many ways. According to legal positivists, validity holds value as it provides for wider social coordination and order and clarity in moral and legal thought. It is also argued that validity is required by judges and lawyers as an indispensable means to establish legal pedigree. Accordingly, the criteria of validity allow for the easy identification of the law in particular cases because the social facts constituting the criteria of validity are clear, for example, official use of legal standards and general conformity of the population to them seem to be easily observable facts. Evidently, judges need the criteria of validity to help them ferret out a definable set of specific rules from the [assumed to be?] expanding or amorphous universe of principles which are then recognized generally as constituting the law.

Indeed, there exists a set of background principles which guides legal practice in this regard. These principles include: 1)Authoritative sources can be identified through observance of authoritative claims and by virtue of their relationship to force; 2)Authoritative sources are or can be said to be accepted simply by virtue of the fact that they are used by those in power with the consequence of general conformity ; 3)Rules emanating from authoritative sources can be applied to various particulars; 4)Those to whom such rules apply ought to conform to them. The social fact thesis, especially the strong version of this which I, along with Raz, have argued seems logically necessary to legal positivism given its claims, accomplishes this task. I do not doubt that the specific constituents of validity including authoritative institutions and texts, rules of recognition, change, and adjudication, referential rules, use of rules as general standards, and the idea of conventional acceptance can indeed work to identify a logically distinct set of legal rules. In doing so, law might be said to regulate its own existence. The difficulty confronted by this dissertation concerns the relationship between the tasks of identifying the law versus applying and justifying the law. I think that those involved most directly and continuously in law do require some distinct and clear means useful for identifying the law in particular cases.

There would seem to be two important ways in which to deal with the legitimate interests of the legal profession in establishing some reliable means specifically intended for identifying law. Legal positivism provides one way and natural law theory the other. Legal positivism's answer is to separate law and morality at a variety of levels including at the level of the identification of the law and the determination of its necessary content. The logic of validity as established by the social fact thesis disallows moral content in the law. The weak version of this thesis dictates that the law has no necessary content. The strong version, the one which seems most true to legal positivism's interest in setting out distinct means for identifying law, dictates that the law can have no moral content. The function of the strong social fact thesis is to place a logic-lock on the content of law. In either case, legal positivism does not bar judicial incursions into the moral field, though it does not require them, and arguably, as we have seen, it distorts the reasons for undertaking them, and so, the nature of moral judgement itself.

Natural law theory attempts to identify a basic set of universal moral principles which help to secure the common good which itself provides the ultimate basis or the legitimacy of political and legal authority. The intention is to encourage participants in law including officials and citizen-subjects to think about them as they go about securing their interests and performing responsibilities in and outside of the law. The *general* nature of these principles clearly leaves room for diversity of values and for various forms of discretion including that associated with judicial independence. The rule of precedent and some of the related aspects of validity including the use of rules of recognition can operate widely within the boundaries set by these principles but *not* exclusively by themselves or apart from the justificatory requirements of judicial decisions. Again, this view does not disallow significance to conventional acceptance, the existence of general or secondary rules, and their systemic relations to more specific rules *as* reasons for applying rules. At a minimum, the basic justificatory principles involve security of persons with respect to their own survival and the means to it, all of which must be understood as constitutive of common good. But I have tried to show that there is consistency between natural law theories with regard to principles of freedom and community. The ideas of practical reason and achieving balance between abilities and goods are important to the former, the ideas of socially or contextually-bound individual interests and participation in common goods are important to the latter.

There is then an absolutely crucial difference between natural law theory and legal positivism with regard to the theoretical place and practical significance of the criteria of validity. The logic of validity entails its use for the purposes of justification in so far as this involves judicial assertion of the criteria of validity as reasons for applying the law. Evidently judges need not cite any other reasons for their decisions to apply the law. Related to this, there does not seem to be any important component in legal positivism focusing on the idea of judicial role-responsibility. On the other hand, natural law theory denies exclusive use of the criteria of validity for justification in law and encourages judges, lawyers, and citizens to think in terms of the *integrity of law* .

If a political system is providing or trying hard to provide goods to all its members, then the case for recognizing the value of the criteria of validity in terms of, for example, stability and consistency in law and the provision of social order improves. The internal consistency of a system on its own lacks practical value. Even social order without any qualifications has no independent or inherent value. Death camps can be orderly places, they can ensure their own existence, and can even provide to some at least what count as goods in more normal circumstances. It is fine to identify law on the basis of the criteria of validity. On the other hand, the justification of the application of laws requires reference to the goods promoted by a political system because of the inescapably practical and moral consequences of applying the law such as the importance of dealing with interests in competition and cooperation, the demands of sacrifices, and those of practical reason. Second, such requirements are necessary if we are to distinguish clearly between law and force because neither the structural features of the criteria of validity, nor the associated internal attitudes toward rules, nor even the pretense of legitimacy serve to distinguish force from law. One might object that it is the successful or effective use of the criteria of validity which serves to differentiate between law and force. However, this really seems to suggest that the difference boils down to a matter of chance since no one is charged with this responsibility.

There remains the outstanding question about the boundary line between legitimate political-legal systems and illegitimate ones. There is also the related question about what one should do in the face of a judge's validly-rendered but unjust decision. Concerning the latter point, we can say that such situations must be infrequent, and when they do occur their acceptability depends on the justifiability of the political-legal system as a whole. I hope that the substance of the justificatory principles important to natural law theory is clear. Generally, legitimate systems must begin by providing all their members with the most basic goods of survival then, or even simultaneously, move toward the development of a responsible citizenry through educational emphasis on practical reason and participation in common goods. It is education which ensures responsibility and good faith. One thing is certain. These principles have nothing in common with the vague notions about "general moral-political principles' and plainly sterile commitment levels of officials offered by legal positivism. Those principles [sic] and commitment levels [sic] were found to be question begging . My effort to define more appropriate principles and commitment levels is an attempt answer the questions begged.

There is no clear or singular natural law theory answer to the question about the boundary of legitimacy. Part of the reason behind examining such diverse theorists as Finnis and Rousseau was to illustrate this point. If we side with the Rousseau, nearly all present states must be viewed as patently illegitimate. If we side with Finnis, whose view of the matter is more circumspect than Rousseau's, we see that Finnis generally hesitates to denounce political-legal systems as wholes, though he recognizes the possibility of wholly unjust regimes. For the most part he is concerned with identifying some principles intended: 1) to guide an official's reasoning in the areas of the application and justification of legal decisions in a way which promotes the legitimacy of the system as a whole; 2) to guide a citizen's reasoning about political obligation including what to do about a particular unjust law *within* the context of an overall just regime.

At the same time, there are some well defined differences between what sorts of regimes are *in* and *out* , so to speak, from the standpoints of legal positivism and natural law theory. As we have seen, according to legal positivism highly abusive regimes such as South Africa under apartheid and Nazi Germany are *in* in the sense that their laws may be said to be as valid and justified from the standpoint of legal validity as very much more inclusive and just regimes. This simply cannot be the case under the conditions of natural law theory as I have set them out. Natural law theory is too sensitive to the practical and moral fall out associated with the forceful application of the logic of validity in these cases. The idea that generalized abusiveness might be justified by the proposition that 'the law is the law' is not acceptable from the standpoint of natural law theory. In addition to this, many of the valid laws of these regimes, or any others, must be viewed as *out* according to natural law theory simply because they violate in the extreme its basic justificatory principles. It is difficult to set out a clear legal positivist position on the specific sorts of moral standards appropriate in relation to the evaluation of law. While most legal positivists are liberals, and so , we can imagine, are committed to various degrees of tolerance and equality, Hart's position on the necessary conditions for the formation of moral principles in societies seems at least very incomplete, and the general indifference of legal positivism to the practical and moral implications of justification aided by the view that *logical* distinctions between law and morality somehow must carry great practical weight is disturbing.

Application of the justificatory principles of natural law theory to say, a country like the United States, where problems such as fascism, jingoism, the intolerance of the extreme right and some parts of the left, right-wing moralism, the acceptability of political terrorism, and material inequality all seem to be growing seems unnecessary and without much point. The clear dividing line between the U.S. and a country like South Africa under apartheid is the *state-sanctioned* oppression of black people associated with the latter, and depending on where you stand, the indifference toward, or the unofficial support of, or the incapacity to act in response to great injustices associated with the former. This introduces some practical considerations.

What is the relationship between the size and diversity of the state-society nexus and its capacity to act according to the justificatory principles of natural law theory? I will not attempt to answer this question here. But, from what I take, on balance, to be a circumspect standpoint of natural law theory, we must say that so long as a *capacity* to act remains, and so long as the state stands away from officially sanctioning violence against its members who are not criminals, we should not conclude that the regime is unjust *overall* . In the cases of indifference and unofficial sanctioning, we should allow that all potentially corrective measures ought to be exhausted. There are practical considerations here too, not the least of which concerns the question of how much time ought to be given to the state to bring about corrective measures, which I cannot now develop. I do not think these latter point render natural law theory as a critical theory innocuous. For it is more important to try to supply practical moral principles for use in legal practice than it is to condemn or congratulate regimes as wholes.

I think the discussion of this section, and that of Chapter Five shows that natural law theory affords the soundest theory of justification because it takes very seriously two problems intimately related to justification. For it focuses on the question of *good reasons* and on *good reasoning* . The ethical naturalist dimension of natural law theory supplies the basis or foundation of good reasons, and its non-consequentialist dimension and focus on practical reason develop the model of good reasoning relating it back to the morally-relevant facts provided by its ethical naturalism.

Because, for example, Finnis' idea of "practical reason" appears *both* in the kernel of an inclination and reaches full development on the basis of non - consequentialist concerns and the importance of the integrity of moral being and action, we see fluidity between these dimensions But this is not a logical problem. For it is sensible to speak of, on the one hand, the *non-moral* source of practical reason in the birth of self-consciousness, and on the other hand, practical reason's *right-making capacity* . By the same logic, Rousseau can speak of the ideas of "natural right properly said" and "reasoned natural right".

Ethical naturalism also supplies an end to the otherwise infinite regress risked by external justification. This is important in so far as the meaning of justification involves an *anchoring down* of principles and reasons. In the end, the appeal is to the desirability, rationality, and practicality of *developing* natural, non-moral, *inclinations* and capacities toward their moral directions. These inclinations and capacities themselves are capable of a proof through observation and analysis of the relationship between psychological and moral constitutions. The rational desirability of goods, though, is a function of one's own effort to understand moral life in general. Recall, for example, my contention that Rousseau's understanding of alienation can be validated by experience and the discussion following the schematic of Finnis' schedule of inclinations and basic goods.

Finally, I have argued that though the fullness of the schedule of inclinations, needs, and related principles offered by natural law theorists varies, there is common ground between natural law theorists as diverse as Finnis and Rousseau. For Finnis' notion of practical reason is relevantly analogous to Rousseau's idea of freedom given the fact that they share the characteristics of non-consequentialist reasoning, and the clear common effort to find a genuine balance between needs and abilities. Further, both of them argue for notions of community and common good which are non-Utilitarian, and in this and some other ways, even illiberal.

The Proper Relationship between Officials and Subjects

There are, as we have seen, a number of distinct relationships which compose the general relationship between officials and subjects. The discussion above of some of Rousseau's insights into the general relationship was especially helpful in identifying and understanding the nature of these particulars. They include: 1) the relationship between officials and the purposes of law; 2) the relationship between officials and the practice of law or between officials and officials; 3) the relationship between officials and citizen-subjects; 4) the relationship between citizen-subjects and officials, the practice, and purposes of law; 5) the relationship between citizen-subjects and other citizen-subjects.

Natural law theory finds much to be desired in the legal positivist treatment of all these relationships. When legal positivism identifies any one of these relationships as belonging to law and legal practice, it treats it incompletely. Other relationships are simply treated as outside of the sphere of law. In the latter cases, we critics are forced to draw out the legal positivist position by implication or inference. About the whole, we can say that the concept of *role-responsibility* is generally absent in legal positivism's understanding of what both officials and subjects do and ought to do according to the specifications of valid law. This is unfortunate since understanding what individuals do and ought to do is often tied to the requirements of the roles they have. A *role* can be seen as a classification of a set of tasks which must be performed. The relevant sense of *responsibility* here can be understood initially as performing appropriate and expected duties, and as inviting or involving appropriate responses when duties are in fact performed and in the event that they are not.

Of those relationships enumerated just above, legal positivism analyzes the first relationship only awkwardly because of the tension between internal justification and external justification discussed above. As we have seen, if the effectiveness of law and the reduction of the purpose of law to order-achievement are what count in law as most relevant, these ideas must stand to certain tests. If validity is not most efficient with respect to order-achievement, it must be discarded. Further, if ends themselves are what count, they must stand the test of comparison with other possibilities. If there are better ends, order-achievement must be discarded at least as the main purpose of law, perhaps along with validity if it failed to promote the other ends deemed more appropriate. If validity retains some independent value apart from these ends, it must be argued out, though it is hard to see how this could be persuasive given that an important part of its logic denies the need for justificatory argument. Could Canadian law really be *better* than Nazi law because it employs more complete criteria of validity? Or is it *better* because it more closely follows the rule of law and incorporates some worthy moral principles into the normal practice of law?

Legal positivism treats the second and third relationship above only very incompletely. It examines the fourth relationship peripherally and in the most general terms at best. Finally, it does not consider the fifth relationship at all. From an analytical standpoint all this is problematic because, as Pincoffs writes: "To understand [the function of an institution], it is necessary to understand the practices that together constitute the institution, *including other roles* that are played according to the rules of those practices. " [my emphasis] [17]

It is important to see first that role-responsibility, especially that relating to legal practice, implies other senses of responsibility. Such role-responsibility invites or involves *many* of the forms of responsibility. For example, the mere fact that the non-performance of a task invites a response of criticism and maybe calls for accountability assumes a number of points. It must be understood that the person who failed to perform the task can sensibly be held *liable* or answerable to a response in the first place. Often times this is because, due to their non-performance, they *caused* certain undesirable consequences to occur which must be addressed. When this occurs, the responses might be blame, or criticism, or calls to do better, or not to do again, or some form of repayment or punishment. But this assumes a requisite level or *capacity of rationality*. This might be evidenced in a number of ways including through the voluntary assumption of a role or tasks; the respect shown for expectations, interests, and rights; the success of the practice of holding others responsible; the actual use or employment of justificatory arguments etc. Most critically here, we see that *both* officials and subjects in their relationships in legal practice are commonly assumed to hold the aspects of responsibility set forth above. In addition, judges, especially those in the highest courts, are recognized to have the *final*, decisive word on legal and constitutional matters suggesting that they have a responsibility to protect and preserve the most important principles of a polity. In democratic theory, citizens are said to have a similar responsibility. Legal positivism takes no serious account of these issues.

In so far as ends or purposes of legal systems are embodied in rules of recognition or alternatively, understood as products of validity, the internal attitude of officials described, and evidently prescribed as a very weak version of role-responsibility by legal positivism, does not require them to take up *any* serious position with respect to these *ends*. It only requires that officials "effectively" accept the "rules" of recognition and "seriously" assert the "validity" of any particular law. The former idea is defined in terms of "regarding" the rules as common standards implying that officials also use the rules to "appraise critically their own" behaviour. The second idea is satisfied when an official uses the rule as an instrument of validity, that is, actually uses it to identify the particular law.[18]

Now there is little doubt that this misdescribes the actual situation. Most judges take the substantive purposes of laws quite seriously often defending them but sometimes not. In addition, a serious and *committed* attitude toward ends is implied by the *willingness* of a person's assumption and use of a standard to criticize their own actions. Willingness of assumption, and, therefore, a level of commitment, even follows from the legal positivist requirement that "some at least [effectively officials] must *voluntarily* co-operate in the system and accept its rules "[my emphasis]. But Hart says that"it is not even true that those who do accept the system *voluntarily* , must conceive of themselves as morally bound to do so...their allegiance may be based on...calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do " [my emphasis].[19] But how can the willing, free, non-coercive, "voluntary" assumption and use of a standard as one's *own* , especially of the serious nature implied by most rules of recognition, be described in terms of "unreflecting" attitudes or a "wish" to follow? Is one not, in these situations, actually unfree since hobbled by their unreflecting attitudes toward tradition or other forms of mental slavishness?

The view of legal positivism toward the relationship between officials and officials or the practice itself is also difficult. For legal positivism seems to accept that the effectiveness and integrity of judicial practice might be acceptably compromised by deceit. As we know, Hart does not require officials to take up any moral or committed position with respect to justification and

Raz only requires that they pretend to do so. I have suggested that this view seems to place legal theorists and practitioners in the unenviable, Machiavellian position of having to devise ways in which the pretension and guile underlying this notion of justification might be successful. Not only is this morally unacceptable, but this allowance sacrifices at least some of the capacity of a legal system to operate effectively. But the sharing of common standards between officials seems to imply another dimension of role-responsibility not well-discussed by legal positivism though consistent with and supported by natural law theory.

If officials are using *common* rules they must know that others are doing the same, and therefore, come to rely on this use such that it creates a climate of mutual expectations and respect. They can then be said to have certain internal interests in and responsibilities toward maintaining the soundness of this practice. Legal positivism seems to cast the soundness of judicial practice solely in terms of the stability and consistency between rules or laws as the logical product of observance of the criteria of validity.

We can say that the relationship between officials and subjects, or the sorts of responsibilities judges have toward those who come under legal obligations, contemplated by legal positivism, are attentuated in the extreme and so must be drawn by implication only. Presumably, general conformity to law is consistent with the identification and application of valid laws. But why? Legal positivism characterizes this result as a logical part of "what is in fact involved in any method of social control...which consists primarily of general standards of conduct." This sort of practice apparently presupposes that laws are intelligible, possible to obey, and prospective.[20] In short, it presupposes some of the most basic "managerial" features [21] of Fuller's notion of the "inner morality of law". In other words, judges evidently do not have to do anything special in terms of commitment-making and responsibility-taking in order to ensure general conformity. Further, the so-called "characteristic judicial virtues...[of] impartiality and neutrality in surveying the alternatives; consideration for the interest of all affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision" are logically separate from the criteria of validity and so imply that acceptable judicial decision-making can operate "in the breach" of these virtues. [22] The same argument applies to Raz who holds that the rule of law is not necessary to valid law, or at least not related to it as a positive value. [23] On the other hand, we have seen that Fuller, Finnis, and Rousseau argue that officials including judges must assume positive duties to strengthen the rule of law, and that this is implied by the nature of the practice itself.

It follows from much of the above discussion that legal positivism recognizes no need for citizen-subjects to have any special responsibilities defining their relationships to officials, legal practice or purposes, or to each other. For general conformity, as part of the criteria of validity, can exist *even* when most are coerced into submission. It makes no difference, from the standpoint of a valid, internally-justified judicial decision holding a subject under a legal obligation, whether the subject's conformity arrives as the result of coercion, corruption, complaisance, or carelessness. This can be examined against the concerns of natural law theory to bring about the common good and protect the integrity of all agents.

In sum, we can say that natural law theory treats the general relationship between officials and subjects and all of its particulars in the terms of role-responsibility. Officials and citizen-subjects are understood as involved substantially in the practice of law which defines the roles and responsibilities appropriate to them all. All have a stake in the process and the integrity of legal practice depends on the recognition and security of these interests. Following Fuller, Finnis, and Rousseau we must focus on the idea of an appropriate practical viewpoint on the law. These writers emphasize different aspects of such a viewpoint, all of which contribute to its development. Fuller highlights the importance of leadership especially with regard to facilitating open, honest, and responsible communication between officials and citizen-subjects. Finnis centers his analysis and evaluation on the sorts of moral standards which ought to inform everyone's including judges' reasoning in law. Rousseau argues that officials should endeavor not to separate themselves from their capacities as citizens lest they violate the basic terms of the political association.

The Proper Relationship between Law and Evil

We have noted that according to legal positivism observance of the rule of law and the proper application of the criteria of validity are consistent with the perpetration of great institutional evil. Even though the institutions of law follow the directives of legal validity they might be called upon by other institutions to promote and enforce horrifying but valid laws and consequent actions. I have argued that this moral problem results from an incomplete understanding of the purpose of law and the rule of law which wrongly views legal and moral justification as distinct and potentially rival enterprises. If adjudication follows the rules of validity judges are legally justified in holding others under legal obligations. Additionally, in practice the coercive force behind law puts the probabilities for success in favor of legal justification. For legally justified and enforceable decisions are normally effective ones. So, evidently legal positivism understands that the effectiveness of law results from observance of all the matters relating to legal validity and justification, and from the monopoly on force behind law. Though differentiating between the relative impact of force versus the criteria of validity on the effectiveness of law is in itself an interesting problem for legal theory, it is not one taken up centrally by legal positivism.

In so far as legal positivism assumes that the effectiveness of law is primarily the logical and practical result of valid judicial practice this may introduce a misrepresentation of real events and, once again, throw into question the point of legal justification. On the one hand, legal justification is a simple logical conclusion. But, by its very nature justification is a practical phenomenon. Hence, its use by legal positivism as a legitimating device for real legal decisions. But the essential practice of law is not confined, as legal positivists seem to require, to the events and only to those events leading up to and comprising the determination and application of a law. Law and legal practice involve those subject to it as well, and so anyone concerned with the effectiveness of law must be concerned in an appropriate way with subjects too. Natural law theory accounts for this fact through a variety of considerations including its treatment of the rule of law, common goods, and the participation and integrity of citizen-subjects. The result of these considerations is that while the practice of law according to the terms of natural law theory cannot be free of evil and the production of evil, the possibilities for evil are strongly and necessarily constrained.

As we saw in the discussion of Rousseau above, the limitation of evil follows from the numerous moral, political, and legal constraints developed by natural law theory. The primary moral and political means include the enhanced participatory role of citizen-subjects and the necessity of serving common goods. The primary legal means involves upholding the rule of law. Rousseau argues for the most radical conception of the former means since the body of citizens legislates. Finnis enhances general participation when he takes account of the importance of cultivating the individual's capacity of practical reason, and as we will see below, through his support of a direct and responsible relationship between citizens and the law. It is prominent in the work of Fuller too. He describes the maintenance of a legal system in terms of "the discharge of interlocking responsibilities - of government toward the citizen and of the citizen toward the government." [24]

On the other hand, in so far as legal positivism is concerned at all with the maintenance of legal practice, it seems to suggest that this follows from official observation of the criteria of validity alone. Since run-of-the-mill subjects have no responsibilities to participate in or help maintain a sound legal practice, we might say that officials actively maintain the law through their use of rules promoting validity. If we grant this, we must admit it also as a rather petty exercise remembering that legal positivism separates validity from the rule of law and judicial virtues. Further, the idea of active and committed maintenance of the law becomes more vapid when we consider that maintenance is a logical implication of "general conformity"alone. There does not seem to be any practical concern with suggesting ways to maintain actual systems of law even though the function of legal justification in legal positivistic terms is clearly practical.

There is little need to reiterate the details of the other primary moral and political constraints on evil set out by natural law theory. Both Finnis and Rousseau argue that the justification of the law and the political system as a whole is tied to its ability to serve common goods. Rousseau, Fuller, and Finnis argue for a mature concept of the rule of law which differentiates law and legal systems from other forms of social organization in morally-relevant terms. This relates back to the non-consequentialist side of natural law theory because the rule of law presupposes that it is the individual as a citizen-subject who follows and participates in law, not as a rational-calculator, an automaton, soldier, or organizational underling. It is because of this assumption that from the standpoint of the integrity of legal practice, officials and judges must make some special commitments. Fuller describes these commitments as following from the requirement of the "congruence between official action and declared rule". Rousseau and Finnis put forth similar ideas.

When combined these three conditions limit the production or occurrence of evil. Individuals who receive recognizable and common benefits from a political and legal system maintained by responsible and committed officials, and through which their meaningful participation is ensured, have key interests and stakes in that system. The probability of the appearance of the worst forms of evil including arbitrary and violent tyranny or genocidal practices or aggressive imperialism or severe racial and material injustice decreases. Perhaps these are truisms. What is not unfortunately recognizable as a truism is that law, and legal theorists and practitioners ought to be much more directly concerned with these problems and their solutions *in law*.

Respect for Law

Though many natural law theorists argue for a general moral *obligation* to obey the law, and legal positivism is centrally concerned with providing an understanding of the sense of legal obligation, I focus here on the notion of *respect for law* as a constituent of the *integrity of law* . There are many reasons for taking this tack. My approach supplies what is crucially missing in the legal positivist account, while avoiding the difficulties encountered by natural law theory when it tries to defend the idea of a general obligation, and still securing what it intends as most important to achieve in practice. In other words, behind this discussion we find the question: What is the point of finding that there is an obligation to obey law and can it be achieved in a better way?

But first we need a brief account of the nature of obligation. There are two kinds of obligations. There is the obligation which involves an active, conscious, non-coerced taking on or assumption of a duty. The paradigm case of this is the idea of promise-making. The practical implications of this type of obligation are very important. For the taking on of a duty creates morally-relevant expectations, interests, and motivations. The recognition of the importance of mutual expectations and interests, and perhaps the recognition of associated and correlative rights, provide promisers and promisees with very certain moral experiences and reasons. These serve to motivate performance of required actions and promote the stability of the institution or practice of promising. I will denote this type of obligation as *agent-generated* .

The second kind of obligation involves the idea of being held under or being subject to calls or directives requiring the performance of a duty. The relevant associated experience is one of being under some outside pressure, weight, or force. Such obligations originate outside of the agent and may be experienced as such. They may involve the experience of degrees of imposition and coercion, injustice, and other forms of discomfort. Discomfort might be experienced at least initially for a variety of reasons including the possibility that one is being required to do something which one simply would rather not, or at least would prefer to have had an opportunity to reason out for themselves first, or one is having something done to them which they do not like very much, or because one feels as if their privacy and integrity have been invaded, or because one fears the future consequences. The actual having of such experiences, though, is not necessary to the existence of this sort of obligation. For example, for most of us, we do not experience discomfort from the fact that we are held under laws prohibiting rape and other assaults *since* we already actively, or otherwise would, assume the duty according to the criteria of the *agent-generated* model. Yet, we, and others who may be ignorant of the duty not to commit violence, are still held under the law against these crimes. I am not prepared to argue that it makes no sense to say that obligations cannot exist in the absence of clear consent to them. I will denote this type of obligation as *institution-generated* . I use the word institution because I think it conveys the relevant sense of being significantly outside of or separate from the agent.

At the same time, not just any coercive imposition of institutional authority can count as an obligation, and not just anyone can be said to have the kind of obligation under discussion now. We would not want to say that just because some authorities, even ones following the criteria of validity, enforce the rule that all first male children reaching the age of majority must strangle their mothers, that such persons were coming under *institution-generated* obligations. No doubt some of such individuals might feel obliged, that is, forced to carry out such an order, but they cannot be said to have or even come under obligations here. On the other hand, it makes fine sense to say that persons who steal for excitement or sheer profit, whether involving the pilfering of frozen tomcod from the communal ice hut or the bilking of pension funds, have obligations to not steal other person's property whether the obligation has been consented to or not. Further, it makes fine sense to say that fathers generally come under legal or moral obligations to refrain from having sexual intercourse with their daughters even if they do not actively take on such an obligation. But not just anyone can be said to come under even the most sensible of obligations. Two-year olds, severely mentally-handicapped persons, and psychopathic people cannot be held under the obligation to not murder because they cannot be subject to the usual consequences of murdering someone, that is, to the normal processes and sanctions attaching to the violation of such an obligation.

If this is correct, then it suggests that there is, after all, an important relationship between the two kinds of obligations described above. Because the persons described in the last example fail to meet even minimal standards of rationality, such persons cannot sensibly be subjected to the administration of justice because they either cannot achieve the required minimum of rationality, or they are too distant from it. Persons who do meet the minimum requirement can be held under an *institution-generated* obligation even without having consented to it because they could , would, or should have known better. The presumption of a minimum level of rationality, and so, responsibility, stands behind both kinds of obligations.

No doubt, as suggested just above, there can be, and often is, overlap, cross-over, and coincidence between these two kinds. For example, a convicted murderer might feel the imposition or weight of authority and after confessing, experience remorse and a genuine recognition of the fact that he did violate an obligation he could and should have more actively and earlier assumed. Further, an individual charged falsely for murder, is and remains under the appropriate laws and legal obligations regardless of her awareness of the legal technicalities, and in this case will likely experience being imposed upon, as well as continue to experience the consensual aspects associated with agreeing and acting according to the moral principle that murder is wrong.

Nonetheless, the classification discussed so far is important for many reasons not the least of which is the existence of more or less pure cases. Another factor relevant to obligation is the idea of degree of weight. For obligations at least in theory may be *absolute* or *situational* in terms of the appropriateness of the actual performance or discharge of the obligation. Some obligations must always be performed and others vary with circumstances which might include assessment of other competing obligations and principles or other morally-relevant considerations. Putting all the pieces together we can organize *obligation-types* into the following schematic.

Fig. 9-1:

	Situational	Absolute
Agent- Generated	**A**	**B**
Institution- Generated	**C**	**D**

Promises, for example, occupy cells A and B. The sense of legal obligation argued for by legal positivism is incarcerated, so to speak, in cell D, though this view of legal obligation need not be understood as the sole occupant of this block. Since laws endeavor to be discrete and non-overlapping, legal obligations are in principle of equal and absolute force. For most practical circumstances there exist correlative legal obligations covering the case. That the legal positivistic notion of legal obligation assumes this view is not surprising considering the discussion above about the way in which it excludes citizen-subjects from the practice and institution of law. Unfortunately, the myth of discrete and non-contradictory laws and legal obligations or at least the utility of it, breaks down because the practical and moral context or background itself cannot be broken up into logically and usefully distinct and correlative bits of social reality.

Part of this reality which I have argued is not well-treated by legal positivism concerns the role of citizen-subjects. Legal positivism certainly assumes that citizen-subjects can sensibly be said to *have* legal obligations. That is, citizen-subjects come under or can be held under legal obligations. Let us have another look at the practical aspects of this view through the use of an example which is unfortunately all too commonplace.

Imagine a youth gang called the Vice Grips in control of a large inner city neighborhood. The Vice Grips as a pseudo-authority clearly set and regulate social [sic] practices, are avoided by police and are effectively at liberty to disobey the law. One evening at a regular gang meeting they decide, somewhat unimaginatively, to branch out from drug trafficking, prostitution and pornography rings, and racketeering into purse snatching. Now a new practice develops and evolves in the neighborhood. Purse snatching is now regulated by generally well-observed and well-known rules willingly accepted by our pseudo-authorities presumably to the extent of enforcing it in relation to their own grandmothers too.

One day, 80-yr. old Hazel McGilicutty, when confronted by a mugger demands, confidently since the rule is general, to see the man's credentials (say, the left hand's forefinger and little finger outstretched, the others folded in, with the extended fingers brushing the left temple toward the eye). Subjects *cum* victims can take this as an authoritative sign since no self-respecting non-Grip mugger would dare to feign it. Note that Hazel *qua* subject exhibits the rudiments of an *internal* attitude when she makes the connection between the particular act and the general rule, an attitude not required of run-of-the-mill citizen-subjects for the validity and justification of legal practice according to legal positivism. Is poor Mrs. McGilicutty under a legal obligation? Of course not! For the police do not *always* leave the Grips alone, and their revenue-generating activities lack a *formal* source in that authority represented by the police.

But, what if legislators through neglect, inability, financial pressures, or corruption fail, that is, do not even attempt anymore to straighten out the

Grip problem with the possible exception of patrolling the wall of affluence around it. Suppose, aided by official police policy recognizing the above exception, that this becomes transparent to everyone in the neighborhood. Aren't the legislators *in effect* authorizing the Grips to do what they may? Would explicit, formal recognition of the Grip pseudo-authorities by the real authorities make any relevant difference especially to those persons on the ground so to speak? Is Mrs. McGilicutty now under a legal obligation? What is the legal positivist response to this question?

What if someday, due either to frustration or to bad conscience or ironically to faithful concern for some aspect of the rule of law like the need to abolish laws which cannot be enforced, legislators decide to formally write off the Grips. Mayor La Puissance of Jadedborough and Fortis J., the captain of Gripolis, meet and agree never again to trespass on their respective turfs. Is Mrs. McGilicutty under a legal obligation? Here, it seems that legal positivism in principle is committed to an affirmative answer, perhaps under the condition that social practices and institutions in Gripolis develop a little more systematically in relation to the notion of validity. For now the Grips are at *formal liberty* to do what they may so long as they institute social practices regulated by general rules to which most conform. This is, of course, a travesty. Isn't there a difference between Grip-logic and the logic of validity? Shouldn't the difference be a moral one?

What is the point or points of the legal positivist attempt to locate legal obligation? On the one hand, the identification of a legal obligation does not seem to have much point at all considering that most of the legal positivist effort is to show how laws can be identified through the use of the criteria of validity. From this angle a legal obligation seems a logical implication. For if a law is justified when found to be valid its future application to particular cases, that is the holding of persons under it, can follow. Application of the law is justified in principle. Therefore, validity operationalizes laws so they can be used as needed.

Why is it important for subjects to discharge their legal obligations? The only answer which seems available for legal positivism is the importance of achieving order through the formal means of the "union of primary and secondary rules". A corollary of this might be that it is important to justify the sanctions attached to laws and legal obligations in the event of non-performance. But, strictly-speaking, talk of the importance of securing *any* substantive content at all is irrelevant and unsupported by the logic leading to the order organized by the criteria of validity. This applies to Hart's discussion of the apparent desirability of facilitating the complex social, economic, and technological features of modern society. Logically, the ends consistent with the criteria of validity are then spare indeed in that they seem to be self-fulfilling

What about the point or points of natural law theory's focus on the question of a general, moral obligation to obey the law? Natural law theory too can and does see the point of establishing formal order. But this is not severed from its connection with substantive, moral ends. The main practical point of its discussion of a general moral obligation would seem to be provide citizen-subjects with *reasons* why they should obey the law. The provision of reasons is a necessary aspect of justification and helps to promote stability and more substantive moral ends by encouraging the performance of legal obligations.

Now different natural law theorists provide different reasons for why citizens have obligations to obey the law *and* offer appropriate grounds for disobedience. The overall justificatory schedule may be conservative in intent and content or liberal or even radical. Here we have another reason why comparing and contrasting Finnis and Rousseau is useful and illustrative of the range of natural law theory. For the former offers a relatively conservative view while Rousseau's logic at least suggests radicalism at times. The details of this difference do not damage the definitive features of the concept of the *integrity of law* or subtract anything from their practical utility. For in principle the injustice of a law can affect its standing *as* a law. This is clear in Finnis' work even though he sometimes seems to accept that the injustice of a law will not affect its standing as *valid* law, and even though the opportunities for legitimate or morally justified disobedience are strongly, but I do not think impossibly constrained. On the other hand, the significance Rousseau attaches to principles of equality and democratic rule with respect to the *determination* of law itself would seem to afford either a great many instances whereby revolution would be legitimate or perhaps no instances whereby disobedience of law would be legitimate. Clearly, there is much room between Finnis and Rousseau.[25]

My claim is that the core features of natural law theory offer sensible reasons for why a citizen ought to *respect* the law. Given the link between the justification of law and the provision of common goods, and the enhancement of the roles and responsibilities of agents or citizen-subjects and officials, citizens have good reasons to respect the law. Of course, we must cash this out into appropriate attitudes and actions. But first, I must defend my focus on respect rather than obligation.

The point of natural law theory's effort to determine the existence of a general, moral obligation to obey the law is not, of course, purely descriptive. Perhaps the existence of such an obligation, or of behavior or conditions suggestive of having the obligation can be established or supported empirically. But the moral point of doing this would be to help identify and evaluate the appropriateness of the practice itself. In the end, the resulting prescriptive directive would seem to entail that the having and the recognition of having a moral obligation to obey the law was useful with respect to maintaining the integrity of the entire practice. The value of moral obligation in relation to the entire social-legal practice must have something to do with the provision of good reasons to citizen-subjects for obeying the law. So there must be a very practical and motivational point to the theoretical enterprise. Presumably, if there is a general moral obligation to obey the law it would have an important role to play in the practical reasoning of citizens.

My argument stated briefly but I think adequately is as follows. First, the only relevant sense of a general *moral* obligation to obey the law must follow the model of an *agent-generated* obligation. Here, I track Tom Pocklington's view that the only viable candidate for political obligation or a moral obligation to obey law is the agent-generated or consent-model.[26] This model is relevant because of what it supplies to law-abiding action. It provides indispensable motivating and justificatory reasons to obey law because of the citizen's creation and ownership of the laws and their close proximity to his interests. But the achievement of the model breaks down in practice because the reality is that we more commonly observe the notion of *tacit* consent, but that is *not* consent. So, since in practice consensual aspects are either weak or non-existent, the consent model or agent-generated obligation is impractical as a means to establish the presence of a moral obligation to obey the law. In other words, at the present time, the grounds or source of a general moral obligation to obey the law are scanty indeed. Further, the likelihood of developing strong and generalized consensual features, even in a situation where many of the goods and responsible roles important to natural law theory are seriously developed, seems limited by the size and diversity of many societies. I do not think we either need to or should take up Rousseau's rather luxurious position which suggests that societies which move beyond certain theoretical limits on size and diversity are necessarily illegitimate and corrupt. I also do not think this weakens the claim made earlier in this chapter and elsewhere in the dissertation, that natural law theory sees law as a *public* thing in the sense that it is somehow sourced in the people and possessed by them. I think this continues to make sense . For the public nature of law is gained not necessarily through strong consensual processes, but through the ethical naturalist and non-consequentialist features of natural law theory described especially in Chapter Five.

Second, an effective moral obligation to obey the law involving the recognition of justificatory reasons cannot be based on the *institution-generated* model set out above simply because one need not experience such an obligation in order to have it. This model concedes the loss of the agent's deontic experience of moral right and wrong and the effect this has on the performance of moral action. The necessary effective force of an *institution-generated* obligation is in its underlying sanction. It must be admitted that the enforcement of strong sanctions must be less effective in bringing about or preserving *moral* states of affairs, than many efforts not based on the threat of legalized punishment.

Third, the impracticality of the consent-model or *agent-generated* obligation is itself irrelevant because what seems to be the defining reason allegedly supplied to the agent by the having of a general moral obligation to obey the law is itself irrelevant. For the agent's conscious *recognition* of a general moral obligation to obey the law is rather superfluous to the probability of morally-sound and law-abiding action. The having of this sort of moral obligation to obey the law or the recognition of one's having such an obligation, does not supply any additional, or in any case, significant *motivating* reason to obey the law. Individuals are unlikely to obey the law at a significantly increased rate due to their *recognition* of a moral obligation to do this. In addition, the use or citation of a general moral obligation to obey the law as a *justificatory* reason itself does not add much to law-abiding behavior.

Does the reason ' Because there is a general obligation to obey the law' itself motivate the individual? Does the same reason used as a justification by an individual add anything important to the overall justification of the law? The answer to both questions seems to be no. For the motivating strength of the recognition of an obligation to obey must be strongly outweighed by a citizen's *desire* to participate and her *satisfaction* regarding benefits accrued. It is also hard to see what kind of rational weight the *recognition* of a moral obligation *as* a justificatory reason might carry since it too is based largely on the importance and provision of goods. The most important reasons why citizen-subjects will obey and why they think they ought to obey are the benefits received from and through law, and the value they place on their participation in relation to it. These are the same reasons why they will respect the law.

The idea of *respect for law* can and ought to replace the notion of a general, moral obligation to obey the law. Summarizing the discussion above, there are three related reasons why this is the case: 1) The practical elements necessary to understand or make sense of the notion of respect seem more readily available than the practical elements required to establish the existence of agent-generated obligations; 2) It is more important to focus on the aspects of desire behind respect and obligation. An attitude of *respect for law* seems logically and practically closer to the common sources of one's possible recognition of such an obligation. Empirically-speaking, such attitudes seem more easily located than obligations. Practically-speaking, encouraging them seems easier to accomplish than encouraging the recognition of obligations. 3) Even if persons use the general obligation to obey the law in the senses of either being motivated by it or justifying their or others' actions according to it, these uses do not seem to purchase much in terms of increased law abidingness.

A number of morally relevant consequences and actions follow from respect. No one will defer unreflectingly to the law or hold it in religiously or metaphysically-based awe. Citizens will see the point of law in terms of its promotion, on balance, of the goods important to natural law theory. They will discuss its merits and demerits and take efforts to change it for the better. Often and *because* of these reasons and opportunities they may even give it the benefit of the doubt by obeying a law they do not entirely agree with, thereby also accomplishing at least part of legal positivism's concern for stability in law. This is an active respect which depends on maintaining the sound roles and responsibilities and relationships between officials and citizen-subjects we discussed above and on the receipt of benefits especially those associated with the common good.

Chapter Ten

In this final chapter, I offer brief summaries of each previous chapter and some general conclusions about the practical implications of adopting the natural law perspective put forward here. But first a restatement of the purpose of this dissertation is in order. Perhaps a little ironically, my own general purpose is similar to that stated by Hart in the Preface to his Concept of Law. The first sentence there states that: "My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena." [1] I, too, have tried to do this assuming, like Hart, that these ideas do not mean the same thing. As the last chapter in particular shows, my own view and the view of natural law theory generally, is that we can speak sensibly of distinct legal phenomena and ought to do so. The main difference between natural law theory and legal positivism, as I have argued it, boils down to the relationship between distinctly legal phenomena, like the criteria of validity, and the requirements of justification in law.

The main reason for this difference, I think, is legal positivism's rather ambivalent and confused approach to the study of law generally. As I, a great many philosophers of social science, and all natural law theorists I know of have argued, description presupposes evaluation, and the latter, especially in the normative context of legal practice implies prescription. This means that the *intent* to describe and *only* to describe behaviors associated with legal practice is seriously confused. Description requires selection of discrete subjects for analysis. But there are two clear problems associated with this effort respecting law. First, isolation of legal and moral phenomena is artificial. While sometimes important for the sake of analytical precision, the reality in practice is that all the moral and legal subject matter are interrelated given the fact that law deals with practical affairs and interests. When we speak of interests we tend to make judgements about their relative importance. This is especially the case with law. It seems to me that any adequate description of legal behavior must unabashedly take account of and weigh out the interests attached to them. Second, description presupposes evaluation in the sense that some individuals, and what they do, are counted in as meriting description and others are not. There is then a classification of who is in and who is out of the descriptive loop.

It is one thing to describe non-moral dimensions associated with the identification or determination of law. It is another thing altogether to permit independence for the justification of law or its application based on non-moral or allegedly morally-neutral factors. Where law and legal practice are concerned, observance of the internal criteria of validity hardly qualify as sufficient justificatory reasons for judicial decisions, let alone as sufficient reasons for why a subject should conform to such decisions. Validity might count as a *formal* feature of a legal system, but it cannot count as a form of justification because it must ignore a host of factors belonging to the practical affairs of individuals and societies organized significantly through the law. At bottom, legal positivism misunderstands the concept of law when it reduces it too simply to a system of interrelated secondary and primary rules grounded in convention, and because of this fails to understand the required sense of justification. It also leaves itself open to the criticisms that: 1) It shuts its eyes to the fact that in practice the perpetration of tremendous evil can still gain a good law-keeping stamp of approval and, thereby, gain a sense of approval; 2) The difference between validly-perpetrated evil and invalidly-perpetrated evil fails to distinguish adequately between law and force.

These oversights stack up to a very inadequate treatment of the social, practical, and moral environment within which law operates. Because this void needs to be filled as well as identified, this dissertation has also attempted to identify the proper relationships between these broad areas through development of the concept of the *integrity of law*. So, not only can we say that legal positivism ignores practical and moral implications of law, we can also construct a more appropriate analytical and justificatory framework. It is one which reserves some distinctness and independence to law while identifying clear justificatory criteria which do not depend upon non-moral or legal as opposed to moral factors.

Chapter One put forth the main thesis of this dissertation. Internal analysis and external criticism of legal positivism show it to be an incomplete and inadequate theory of law. This is due to the inconsistencies and weaknesses of argument associated with the internal critique and the impracticalities and justificatory inadequacies uncovered by the external, moral critique. At the same time, the dissertation makes a solid constructive effort to provide more adequate ways of treating the relationship between law and morality through its analysis and evaluation of natural law theory.

In Chapter Two, I identified the main features of legal positivism, arguing that the social fact thesis is more basic to legal positivism than the separation thesis because it accounts for the idea that law is posited by social sources, and because there is much controversy within legal positivism about how to understand the latter thesis. At the same time, we can say that the social fact thesis does imply a version of the separation thesis, that is, the idea that there is no necessary moral content in law. Strictly speaking, if we assume the "strong" social fact thesis, there can be no moral content in the law at all since the logic of validity corrupts the logic of moral argument and justification. Under the "strong" thesis, non-moral social facts authorize or act as a gatekeeper controlling membership into the system of law on the basis of the independent force of the logic of validity. Moral principles are admitted into the field of adjudication *not* of their own force or right but by virtue of a fortuitous, unnecessary connection to authoritative legal criteria. Independent moral force and appeal drop out at least initially while judges undergo a search for a validating referential rule, that is, for a sufficient legal reason why any particular moral principle ought to be considered by the judge in the first place. The appropriateness of the moral principle then is determined in part by the coincidental fact of a referential rule.

But this begs the question about why it might be important to adopt a moral principle or a set of them in the first place. Is it because they carry a good law-keeping stamp of approval or because they speak directly and most appropriately to the legitimate interests involved? In any case, why should there not be a set of rules or principles which attempt to make appropriate linkages between referential rules and moral principles based on, for example, some general idea of the kinds of goods and rights important to the community? If it is important to resort to moral principles especially in hard cases should we not have some general criteria of appropriateness governing this process too, and shouldn't this be an essential component of any complete theory of law?

Finally, according to legal positivism, even though resort to a set of moral principles may be validated in advance with respect to some particular issue, it is not necessary for this ever to be the case for *any* particular issue. There is no built in theoretic-requirement stating that, yes indeed, in hard cases resort to moral principles *is* necessary. This suggests that, from the standpoint of legal positivism, there may be a variety of appropriate ways of dealing with hard cases. For example, a judge might decide a hard case according to her own irrational prejudices, or her own self interests, or perhaps by a mere flip of a coin. But it seems incumbent upon legal theory to supply some standards of appropriateness for guiding such a crucial area of law. We should not imagine that the concept of law or the most essential content of legal practice is fully described solely by reference to the criteria of validity or by the "union of primary and secondary rules".

In Chapter Three, we saw that some legal positivists do have moral concerns about the relationship between the justification of law and the determination of law. For the most part, though, these writers attempt to resolve the tension without making any adjustments to the social fact thesis. For the most part, these writers, in effect, hold that the social fact thesis already entails, or at least is consistent with, a notion of moral justification. For example, rather vague and general "moral-political" concerns already seem to operate behind legal practice defined in terms of the social fact thesis, and no doubt, some judges already do believe or pretend to believe in the rightness of these concerns. But these admissions are question-begging at best and confused or duplicitous at worst. For this forces the question about the practical point of moral justification and evaluation in law. In any case, the social fact thesis no longer can be understood as a morally-neutral set of legal principles useful for determining law if we admit that general moral and political concerns operate behind it. In truth, there is no merit in considering either the task of the determination of law or the task of justifying law apart from the other. An adequate theory of law must take seriously the need to have a more or less independent but principled legal practice and the need to identify appropriate principles of moral justification. This implies that an adequate theory of law might also be an untidy one, say compared to the set of rules found in *Euclid's Elements*.

Whereas my primary intent in Chapters Two and Three was to expose legal positivism's assumptions and viewpoints regarding the nature of law and its relation to coercion and morality, Chapter Four initiated the criticism against legal positivism and the critical exposition of natural law theory. The social fact thesis assumes a gap between the non-moral social facts accounting for the determination or identification of the law and moral considerations especially those important to the moral evaluation of the law. But the defense of this assumption leads to a variety of weaknesses of argument. For example, legal positivism's treatment of the meaning of the concept and the function of validity is ambiguous, and its treatment of the role of citizen-subjects and the relationship between them and officials is incomplete and question-begging. As well, it is very difficult to square legal positivism's discussion of ends such as social order and coordination, the passage to or facilitation of modern society, and the need for moral evaluation of the law with the idea that the observance of the criteria of validity either is an independent and possibly sufficient reason for justifying judicial decisions in law, or is or ought to be taken as a reason by judges interested in justifying their own decisions, or might even be taken by a subject as a good reason for why one is held under a law or why one ought to conform to law. Discussion of the overall function or purpose of law, or of ends external to law begs the question about the efficiency of the criteria of validity as means to these ends. In this chapter, I began defending the critical claim that legal positivism fails as an adequate theory of law on the basis of its internal weaknesses and from the standpoint of external, moral criticism or the *integrity of law* .

Chapter Five set forth the defining features of natural law theory. It exposed the framework of a general theory of natural law theories. This chapter is important so that we can understand the strength of the external criticism of legal positivism. A full appreciation of the critical strength of natural law theory though depends upon seeing the linkages between this chapter and the following four. The defining features of a general theory of natural law theories are fundamental epistemological and ethical commitments. Particular natural law theories incorporate some or all of these defining features. As well, such theories make explicit use of some or all of the desiderata of the *integrity of law*, the term I adopt to describe the critical apparatus used by natural law theorists in their evaluation of the concept of law. A full-blooded or comprehensive natural law theory makes all of the necessary assumptions about the nature of good, moral being, and action in relation to law and legal practice and employs the components of the *integrity of law*. These basic epistemological and ethical commitments include an ethical naturalism especially in the effort to identify the goods, needs, and interests most important to serve through law; a non-consequentialist approach to the nature of moral being and action which focuses on the equality between individuals and the connections between them and the other members of their communities and to the wider community itself; a rejection of the social fact thesis and separation thesis follows from the basic commitments described just above.

Chapter Six first introduced a classification of natural law theories and theorists. It is useful to organize particular natural law theories into three broad classes, namely, conceptual, procedural, and substantive ones. Each of the latter categories can be understood as entailing the former ones while advancing to a higher, that is, more critical theoretical level. Chapter Six then focused on the conceptual level . Conceptual theorists focus on the logical and practical analysis of the meaning of central terms and concepts such as justification and obligation common to the areas of law and morality. At this level of analysis we can identify the necessary connection between law and morality. At this level, however, we make little or no attempt to identify any exact moral criteria necessary for the law to observe. In order to accomplish this we must move on to one of the other levels of analysis.

Chapter Seven identified the basic critical ideas put forward by procedural theorists. Procedural theorists locate necessary moral criteria in the concept of the *rule of law* . The concept is best understood as a bridging-principle between the areas of rule-based legal practice and substantive morality. Here we find principles of legal justice or legality which govern legal practice in meaningfully moral ways but far short of requiring judges to achieve substantial justice and moral right.

In Chapter Eight, I described the main intent of substantive theorists, the range of their critical interests, and some of the the common points between them. Logically, substantive theorists might go so far as to require justice or rightness of each and every particular official decision and action, but few if any would see any real point in doing so. In the substantive theories we consider, we find efforts to identify a set of basic goods constitutive of the common good. The argument is that decisions in law generally must respect and serve such goods in order for the law itself to be legitimate. Legitimacy is not part of the vocabulary of legal positivism. We saw that the goods identified include the value of participation in the affairs of one's community and that this assumption has implications for the understanding of the nature of legal practice itself. Citizen-subjects are understood as having key responsible roles to take up in the area of law. Judicial (and legislative) attention to basic goods can, like attention to the rule of law, serve as a bridge between the sterile, formal logic of validity and moral principles the substance of which indicate cultural peculiarities or relativism.

Chapter Nine dissected the critical concept of the *integrity of law*. The components of this concept include: 1) appropriate justification of the law; 2) appropriate relationships between officials and citizen-subjects; 3) limitation of evil through the law; 4) respect for the law. The concept of the *integrity of law* can be abstracted out of the fundamental epistemological and ethical commitments of the general theory of natural law theories and out of the stated concerns of the particular natural law theories themselves. The first two components are more basic than the second two since these follow in good part from the first two. But it is still important and justifiable to describe them separately for the sake of understanding and analysis. This is especially true in the case of respect for law because of its relationship to the idea of a general moral obligation to obey the law. Further, it is also true that the second component is partly derivative from the first. The premium placed on enhanced active and responsible participation in law by officials and citizen-subjects really follows from the fact that practical reason or moral freedom is taken as a basic good and the justification of law itself depends on serious commitment to achieve all the basic goods. Nonetheless, it is important to focus on appropriate relations between officials and citizen-subjects because these are so constitutive of legal practice.

Here, I will quickly summarize the argument made concerning the *integrity of law*. The need for standards of appropriate justification follows from the need to distinguish clearly between law and force. The most fundamental way of doing this is to recognize the moral status of basic human goods, especially those stemming from but not limited to survival-based interests or needs, and their relationship to law. As we noted, Hart goes along part way with this last point. Law, Hart imagines, cannot help but to protect and serve *some* of the basic goods of *some* of the people in a society. But I earlier criticized this point on two grounds: 1) It is not law *qua* a system of law employing the criteria of validity which reacts to such demands. Results of the kind observed by Hart occur more obviously as a function of the social structure of power; 2) Hart's notion of the service of goods and individuals accomplished by law is insufficient to achieve moral status mainly because it ignores the condition of universality and its implications.

Further, the internal weaknesses and impracticalities associated with the legal positivist view of justification based on validity also show a strong need for a more appropriate theory of justification. A great many impracticalities were seen to attach to the internal attitude required of judges by legal positivism. This was found to be wanting with regard to any serious ideas about judicial role-responsibility. Related to this, we saw that the legal positivist view of legal obligation and justification ignored the fact that law occupies a crucial place in the practical reasoning of citizen-subjects. As a result it is important to account for this activity in legal practice. Finally, I argued that the practical implications of recognizing appropriate justificatory standards and relationships between officials and citizen-subjects include the limitation of evil by the law, and sets up the opportunity for greater respect for the law.

At the same time, the importance of maintaining independence for legal institutions, practices, and values was recognized. The resolution of the legitimate claims coming from the side of law and from the side of morality involved recognizing the importance of, for example, the application of general or secondary rules to particular cases, the rule of precedent, and judicial independence from more blatantly political institutions, and the recognition of the facts of conventional acceptance and systemic relations between rules as relevant but not sufficient reasons for judicial decision making, and on the other hand, the need to justify law through service of the common good. Most importantly, this resolution discarded the idea that observance of the criteria of validity could in practice constitute *sufficient* justification of judicial decisions to identify and apply the law. At the same time, it made allowance for the possibilities that some laws may not serve the common good, and may not be justified in the eyes of some citizen-subjects, and that sometimes it might be justifiable for legal values to trump decisions consistent with the common good. But these allowances are understood as exceptions to the generalized observance and achievement of the goods important to the community through and in the law.

Why should any of this argument be accepted and what exactly are we accepting if we decide to do so? I want to be very clear about what it is about legal positivism that is unacceptable and what natural law theory has to offer in its place. As discussed in Chapters Four and Nine, and briefly noted above, legal positivism does exhibit internal weaknesses of argument. I think these difficulties are serious enough and detract from both the clarity and intent of legal positivism's argument. Overall, I think the most important problem with this theory is that it ignores relevant practical and moral concerns and interests. Since law is a practical and rational enterprise this massive but very willing oversight is particularly perplexing, and necessitates an examination of the possibilities for locating sensible and appropriate standards of justification and behavior.

Let us review the relationships between legal positivism and the various aspects of the *integrity of law* . Legal positivism holds the view that there is a necessary relationship between law and human interests. I argued that this relationship cannot be understood as an acceptably moral one because it was exclusive of many individuals and their legitimate interests. The connection between interests and law, was allegedly exemplified by legal positivism when some individuals, those in power, benefit from the so-called law. But why accept a theory of law which fails to distinguish between systems based on force and systems of law with respect to the achievement of basic human needs?

Legal positivism argues that we can understand the nature of law, that is, the conditions of its existence and the main aspects of its institutional practices without considering any responsible function or role for citizen-subjects. Evidently, we might observe a legal system without any real *citizenry* . Valid, legitimate, justified legal systems require conforming subjects only. Active, responsible, practically reasonable citizens are not necessary components of a legal system employing the criteria of validity. But why accept of theory of law which shows such disregard for the class of individuals which in most political and legal systems is in fact charged with significant governing and legislative responsibilities and, in any case, is always subject to law, and therefore, to its claims of authoritative status almost always based on making a connection to a general set of interests or rights belonging to those subjects? Why ignore the set of circumstances which accounts for the fact that even dictators give at least lip-service to the idea that the people must be served and that the people would or do approve of their dictatorial actions?

If we were to leave matters this way, there would be little difference between law and an organized system of coercion. Allegedly, the criteria of validity, especially the associated idea of an appropriate internal attitude for officials, establishes the difference between purely coercive and legal systems. But as we have seen, it seems that members of organized gangs could adopt the appropriate internal attitude. Judges could apply rules as general standards and meet the legal positivist concerns for internality, even when the standards have the effect of excluding almost everyone but them from the associated benefits of the rules or including almost everyone but them in the burdens required by the rules. This suggests that apart from not placing any value on the citizenry in relation to law, legal positivism attaches an extremely limited sense of role-responsibility to what officials do. Judges do need to concern themselves with justifying their decisions, but it seems that this sense of justification is useful for judges only, or perhaps only for those judges who might happen to care about whether or not there are any grounds at all for their decisions in law. We saw that some legal positivists in fact do care about role-responsibility, but in doing so involved themselves in rather unfortunate and, I think, contradictory prescriptions. For on the one hand, judges were said to care enough about something like the *integrity of law* through attention to "general moral and political concerns", but on the other hand, were allowed to practice pretension and deception in this same regard. Again, why accept a theory of law which, in effect, seems to prescribe irresponsibility on the part of those charged everywhere with interpreting and applying the law?

Evidently, as long as judges observe the criteria of validity, that is, apply secondary rules to various particulars including to themselves where appropriate, we can speak of justifiable laws even in the case of a genocidal regime. The logic of validity would seem to grant a *sense* of approval or legitimacy to such regimes *in perpetuity* . There is no question that legal positivism intends for validity to operate practically as a type of justification . For in order to hold a subject under the law, all a judge *needs* to do, and to be able *to show* was done, is to employ the criteria of validity. But why grant present or future states bent without doubt on evil *any* sense of acceptability or approval or decency or legitimacy or justifiability or normalcy, or even the shell of any of these notions at all? Why, at the level of international politics, should anyone recognize the acceptability of a tyrant's actions based on the fact that he observes the logic of validity or gives lip-service to its rules of recognition?

I think there are only a few possible responses that legal positivism can put forward in relation to the questions posed in the paragraphs just above. As we have seen, the legal positivist might respond that the criteria of validity allow for the most simple and clear description of *modern* systems of law and legal practice. Legal positivism abstracts only a few basic phenomena out of an admittedly complex web of social, moral, political, and legal behaviors, and explains the concept of law, that is, the conditions of its existence, its structure, and the nature of legal obligation, reasoning, and justification on the basis of these few facts. But again, if we take these facts as descriptive of the fundamentals of law it comes at the expense of ignoring much of the array of practical and moral interests relevant to the practice of law. I think this is unacceptable. The discussion of Rousseau and Finnis in Chapter Eight is of absolutely critically importance in this regard.

The concept of law important to all of the theorists of legal positivism examined in this dissertation is a concept of *modern* law. It is not the law of international relations, nor the law of more simple, traditional societies. International law lacks a centralized monopoly on force. Traditional societies were often smaller, more hierarchical, and cohesive due to special attention given to religion or even to survival itself than in modern societies. Because of this, the structure or system of law attached to them, as Hart put forward, includes reliance on predominantly "primary" laws securing interests in survival and social or cultural cohesiveness. There is no or very little need to deal with problems of say, change or efficiency because of the simplicity and stability of such societies. For stability here, according to Hart, is largely a function of the fact that the majority of members of the society take an *internal* attitude with respect to the rules. [2] More accurately, behind the majority's use or acceptance of the rules as general standards are strong social and moral bonds forged by family and community, language and custom, religion, and survival itself.

The most important and defining characteristic of modern societies according to Hart seems to be institutional sophistication, meaning the evolution of legislatures and courts, and the diversity and complexity of interests this implies but seems not to necessarily serve. That is, it does not seem to be the case that some acceptable level of coordination of interests must necessarily be the outcome of modern systems of law. [3] At best, the criteria of validity supplies modern society with a more complex structure of rules. As a result, social relations too become ordered but toward no clear substantive end(s), and not even clearly toward an obviously acceptable level of general coordination. Because of this openendedness of ends, so to speak, use of the criteria of validity as significant reasons for judicial decisions fails miserably.

Strangely, arbitrarily, and I think, implausibly according to Hart, the fundamental characteristics of *modern* societies and their systems of law do not seem to include significant attention to some of the main features of many traditional or pre-modern societies and law, such as the provision of basic goods, the significance of a sense of community, and included in this, a generalized internal attitude with respect to the laws. It is probably true as an observation that on average more officials than citizens have internal attitudes toward secondary rules. But it seems arbitrary to suggest, along with this, that citizens generally lose internal attitudes toward primary rules in modern societies, and in any case, that such attitudes are irrelevant to the validity of judicial decisions. Even more strangely, the essentials of modern societies, isolated by legal positivism as important to law, do not include some features which might in fact be described as *peculiarly* modern such as attention to the values of democratic legitimacy, equality, and responsible individuality.

But, the evolution of legislatures very clearly also implies the relevance of the peculiarly modern values of public participation, democratic legitimacy and equality, and responsible individuality and government. This fact occupied Rousseau's focus on law front and center, yet it drops out of sight altogether in the treatment of law offered by legal positivism. Legal positivism implausibly attempts to link modern society with an apparently *appropriately* matching modern structure of law, one which provides for the problems of "change, certainty, and efficiency", without paying any attention to some of the most defining social, political, and moral features of such societies. Again, the standard of appropriateness here, that is, the measure of the relationship between social complexity and rule-complexity goes unexamined. Further, so far as I can tell, legal positivism does not give concern to the importance of the relationship between democratic legitimacy and justification as a matter of *expediency* , let alone as a matter of political right. It is wrong on both counts. Unfortunately, as we saw especially in the last chapter, the *standard* of legal appropriateness supplied by the criteria of validity, is logically impervious to rational discussion about the *appropriateness* of potential social and moral standards even though it does and must presuppose the latter, at a minimum, by suggesting that either: 1) the norms of a *society* gain moral status because a *minority* of its members, or those in power, grant such norms a special sense of importance, employ forms of moral pressure, presuppose voluntarism, and are slow to change or 2) the norms of a society are culturally or otherwise relative to it.

Associated with the view that validity provides the most exact and complete description of modern law is, I suspect, a certain moral skepticism or at least relativism. On the one hand, all the legal positivists we have considered argue that it is important to evaluate the law from a moral standpoint. The skepticism I refer to can be seen by examining the composition of this standpoint. I do not think that legal positivists generally believe that one can sensibly locate any non-relativistic moral principles applicable to all individuals. The best examples of this skepticism include failure to recognize universality as a feature of moral rules; the ambiguity and vagueness of the the relationship between moral and political standards and the law; the tendency to push analysis of these standards off into the [fuzzy?] field of moral philosophy; and the absurdity of prescribing or at least suggesting the need for judicial pretension and deceit with regard to justification. I have tried to counter this skepticism in a number of ways. In Chapters Five through Nine, I put forward strong arguments pointing to the plausibility of identifying a set of basic goods which play an important part in accounting for the existence of a legal system and in justifying legal decisions in it. I discuss these goods and the principles based on them in a little more detail a few paragraphs below.

Another reason why legal positivists insist on counting only the criteria of validity as relevant to understanding the concept of law might be a concern about the practical implications of widening out the field of law in the ways I have suggested are necessary above. I think some legal positivists are concerned that inoculating legal practice with aspects of public participation, democratic legitimacy, and the requirement of moral justification might breed social disorder. This in turn may betray a further skepticism about the rational potential or capacity of most individuals. Surely these are empirical questions in principle, though ones difficult to test. Suffice it to say that it is hard to see how the changes to law regarding the need to pay closer attention to moral justification could bring any more or worse evil into the world than already exists. Indeed, as we noted earlier, the existence of present levels of evil itself constitutes a good reason to encourage more general discussion about the moral justification of law.

Natural law theory must be seen as assuming that under the proper circumstances, if people can see that they have significant ownership or interest in the laws they can be expected to act responsibly and reasonably toward them. The attitude of respect is partly a function of public education and practice, and partly a function of the recognition and receipt of benefits. Law is a public thing. But this idea need not entail continuous consent or direct democracy as means.

The commitment to a coherent citizenry amounts to a view which takes *politics* seriously and informs the understanding of law itself. Neither politics nor law can mean much of interest unless focused on the more traditional questions of securing healthy political identities and allegiances, and sound communities and the goods important to them. Political study is not about the study of who has power. It is a little better to say it involves inquiry into who should have it. As Sheldon Wolin pointed out so eloquently in his excellent book Politics and Vision , this understanding of politics is undermined in an age of increasing organizational complexity, hierarchy, power, and I must add, privatization of property and the expansion of international capital. Politics and political science are subverted respectively by bureaucracy and sociology (of which legal positivism seems to be a type). Again, I would add that this problem can be further characterized by the attenuation of the public sphere by private power which erodes faith in both the effectiveness and responsibility of public responses to social problems. [4]

The legal positivist view of law plainly presupposes the divorce of law from politics, and most likely as we saw in the early chapters, the divorce of political and ethical studies from sociology. At the same time, and perhaps tellingly, it sees the risks involved in and the importance of trying to save the concept of law from the clutches of unadulterated but institutionalized coercion and force. Hence, its consideration of the concept of *normativity*. But this is purely question-begging without discussion of why having norms *in law* involving basic and other human interests is desirable in the first place. Natural law theory views law as the most fundamental and comprehensive effort which can be made in order to coordinate and secure the interests of political associations. Law attaches to the political association, and in this sense it is public. The legitimacy, stability, and the coherence of the deliberative capacity of the political and legal system, that is, of Hart's legislatures, depend strongly on engaging a responsible citizenry. The political and legal health of the community is importantly served through the attachments and participation of citizens in it, and through the provision of goods to them.

Now what exactly is involved in accepting the view of natural law theory put forward in this thesis? First of all, there is a rational and moral basis for law. Law must do more than just react to aspects of the human condition. It must work positively toward securing the interests of those rational beings subject to law and which make law important to have in the first place. There is no sound logic in distinguishing law from force in some other way. Basic interests and goods common to virtually all individuals are seen as accounting for the evolution and justification of law. This implies rejection of the social fact and separation theses. For the common goods and the principles based on them help to determine the content of law. While these determinants might be construed as *social* facts, they cannot be understood as bereft of moral content or relevance.

Further, citizen-subjects come to be more involved in legal practice. Citizens' capacities for practical reason are taken seriously in the sense that the justification of the law entails the looking after of the common interests or goods important to citizen-subjects, and in the sense that law abidingness is understood as most effectively secured when individuals' decisions to conform to law are informed by the moral reasons important especially under the aspect of *respect for law* . Judges and officials are understood as having a responsibility to provide sound moral justification of their decisions in law. They cannot divorce the justification of what they do in law from the practical, rational, and moral foundations and context upon and within which it operates. At the same time, moral justification can stand comfortably next to the idea that legal practice and reasoning require some independence.

Basic goods are easiest to see where human survival is concerned. Of course, even the content of these goods is not uncontroversial. The goods of survival have an objective basis in various vulnerabilities, needs, and interests of humankind. Since legal systems develop in order to meet these and other needs, it makes sense to speak about the moral justification of law in terms of the provision of basic common goods.

But I do not think one can be altogether true to natural law theory and accept *only* the requirement of serving a set of minimal survival-based interests. Natural law theory assumes the importance of integrating a comprehensive and interrelated set of human needs in a way conducive to personal well-being and the common good generally. Principles of individual well-being and common good in the natural law view then, very likely entail that there are individual as well as collective natural rights. I have not been arguing that we must necessarily accept the truth of any particular comprehensive schedule of goods, for example, like that of Finnis'. At the same time, I think much of his view of the nature of basic goods is solid. At a minimum, the natural law view implies acceptance of two general injunctions. These are the ideas that I have argued are well represented in the work of both Rousseau and Finnis. I am not saying that Rousseau and Finnis think exactly alike. Of course they do not. The first injunction suggests that individuals have a basic interest in freedom defined in terms of *balancing their abilities and their wants or needs* . For Finnis this presupposes development of practical reason, while for Rousseau, it presupposes a rather simple, and strongly-directed view of moral freedom.

The common idea between them implies most importantly that abilities may not be developed successfully if one assumes no upper, or at least some kind of clear limits to wants or needs. Without building in limits to our understanding of wants and needs we risk remaining in the realm of necessity. We also risk simply being unable to make a reasonable choice in the face of the expansion of choice itself. The distension of want and need might outstrip abilities or capacities in two ways. Wants and needs might multiply faster than a person can meet them or this multiplication might introduce a situation where it is simply not possible to develop one's abilities any further in order to meet new wants or needs since abilities or capacities are stretched to their own limits.

I think this notion of a balance between abilities and needs involves two things important for individuals to secure, namely, peace of mind and the successful and responsible achievement of one's interests. Importantly, Rousseau's criticism of liberalism and Finnis' criticism of consequentialism and the extension of both these critiques to some interpretations of Marxism suggest that some of the more common modes and understandings of individual agency and freedom are in tension with the aims put forward just above. The first injunction of natural law theory concerns the ability to do moral business itself. It concerns the way in which individuals ought to approach the many and diverse variations of the particular basic goods they desire. In other words, natural law theory is arguing that individuals have a very fundamental human interest in properly approaching their interests in the first place.

The natural law view of agency and freedom differs from liberalism and Marxism in many ways. As we know, both liberalism and Marxism support the distension of need. With respect to the former, indeed it seems that some of what liberalism requires of or encourages in individuals is incompatible with natural law theory's view of freedom and reason. With respect to Marxism, the problem seems to be more with what Marx and Marxism generally fail to address. In so far as dominant self interest, strong ambition, and unlimited material desire are important components of liberal individualism these are incompatible with practical reason and moral freedom as understood in natural law theory. On the other hand, natural law theory must view Marxism as incomplete in so far as it fails to talk about the importance of individual agency including the importance of the *individual's* own intentions, interests, and conscience, perhaps as opposed to one's "species" consciousness and interests as a productive being.

The second injunction that we must agree to if we accept the full-blooded natural law argument is the idea that *the common goods of friendship and community* comprise essential parts of any individual's repertoire of interests. The natural law position is not a totalitarian or authoritarian position. It does not attempt to subvert individuality or fasten individuals around the state as those regimes do. For as anyone knows, totalitarianism and authoritarianism, unlike natural law theory, cannot take seriously ideas about practical reason or individual self interests or active, responsible citizenship. Such regimes require fearful and submissive individuals, automatons, good soldiers or a Platonic guardian class, or some combination of the relevant qualities of these types. The natural law view simply argues that individuals, in addition to having more or less exclusive self interests, have important interests which exist in and result from the activities of sharing and cooperating, and that law itself ought to facilitate these along with other relationships and interests since its legitimacy depends upon this.

Now I do not view Marxism as compatible with totalitarianism. At the same time, Marxism, as opposed to some socialisms, seems committed to administration on a very massive social scale. Part of this commitment seems to be forced by assumptions made about the dynamic of economic and technological scales of production . For it is understood that economic progress first must reach an appropriate scale in order to deal effectively with questions of social needs and justice . This seems sensible enough. But arguably, I think there is at least some tension between on the one hand, the large-scale social administration of production and economic justice , and on the other, the ability to secure the communitarian values important in natural law theory. On the other hand, liberalism's evident acceptance of high degrees of social inequality and its frequent reliance on a maximizing injunction in relation to social good, are clearly inconsistent with natural law theory's commitment to greater equality and non-consequentialism.

All through this dissertation I have tried to provide sound reasons for why the natural law view ought to be accepted. Besides the internal weaknesses of argument and the impracticalities associated with legal positivism discussed especially in Chapters Four through Nine, we can summarize the reasons for accepting natural law theory under two broad headings. At an *empirical* level, we can observe evidence of the needs for the two injunctions discussed above. Further, we can locate the psychological grounds for these principles in various inclinations. There is a considerable mass of sociological evidence suggesting that a great many individuals are dissatisfied with or alienated as a result of their present circumstances which do not allow for achievement of the proper sense of balance between abilities and needs, or for integration with their communities. We can, given the above , easily determine the objective need or practical necessity of resolving the tension between an individual's abilities and needs, and the tension between individuals and their societies. At a *philosophical* level , we can see that the view of natural law provides the soundest theory of justification in law. First, it is a non-circular form of justification. Second, it takes moral and practical interests seriously. Third, it also takes seriously the idea of providing good reasons to rational beings. Finally, it tries to treat fairly the legitimate values coming from the side of judicial and legal practice along with the need to provide moral justification of the law.

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